S. Hrg. 100-509

COMPLIANCE WITH THE NATIONAL ENVIRONMENTAL POLICY ACT OF 1969 AND AUTHORIZATION OF APPROPRIATIONS FOR THE OFFICE OF ENVIRONMENTAL QUALITY

HEARINGS

BEFORE THE

SUBCOMMITTEE ON
HAZARDOUS WASTES AND TOXIC SUBSTANCES

OF THE

COMMITTEE ON
ENVIRONMENT AND PUBLIC WORKS
UNITED STATES SENATE

ONE HUNDREDTH CONGRESS

FIRST AND SECOND SESSIONS

ON

S. 1584

A BILL TO ASSURE COMPLIANCE WITH THE NATIONAL ENVIRONMENTAL POLICY ACT OF 1969, AND FOR OTHER PURPOSES

AND

S. 1792

A BILL TO AUTHORIZE APPROPRIATIONS FOR THE OFFICE OF ENVIRONMENTAL QUALITY FOR FISCAL YEARS 1987, 1988, AND 1989

NOVEMBER 24, 1987—WASHINGTON, DC
JANUARY 14, 1988—SPARKS, NV

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CONTENTS

NOVEMBER 24, 1988

OPENING STATEMENTS

Page
Baucus, Hon. Max, U.S. Senator from the State of Montana ... 1
Reid, Hon. Harry, U.S. Senator from the State of Nevada ... 3

WITNESSES

Bechtel, Rich, Office of Governor Schwinden, State of Montana, Washington Office ... 28
  Written statement ... 103
Conrad, David, Friends of the Earth, Washington, DC ... 36
  Written statement ... 139
Greely, Gail, Henwood Energy Services, Inc., Sacramento, CA, representing the National Hydropower Association ... 30
  Written statement ... 106
Marsh, Langdon, Executive Deputy Commissioner, New York Department of Environmental Conservation, Albany, NY, accompanied by Keith Silliman, assistant counsel for energy, New York State Department of Environmental Conservation ... 32
  Written statement ... 111
  Supplement to statement ... 119
Muchmore, Lynn R., Department of Natural Resources and Community Development, State of North Carolina ... 43
  Written statement ... 169
Penne, R. Leo, Office of Governor Bryan, State of Nevada ... 41
  Written statement ... 163
Rice, Richard H., Comdr., USN, Director, Environmental Protection, Safety, and Occupational Health Division, Office of Deputy Chief of Naval Operations for Logistics, accompanied by Dick Eddy, assistant general counsel for environmental law, Office of the General Counsel, U.S. Navy; and Tom Peeling, special advisor for environmental affairs, Naval Facilities Engineering Command ... 12
Ryan, John, Federal Aviation Administration ... 15
Sanderson, Richard E., Director, Office of Federal Activities, U.S. Environmental Protection Agency ... 10
  Written statement ... 52
Schopf, Michael, Federal Energy Regulatory Commission, accompanied by Fred E. Springer, Acting Director, FERC Office of Hydropower Licensing ... 9
Silver, Laurens, Esq., Sierra Club Legal Defense Fund, Washington, DC ... 46
  Written statement ... 182
Swartz, Lucinda Low, Deputy General Counsel, Council on Environmental Quality ... 13
  Written statement ... 61, 77
Todd, Webster B., Jr., Aircraft Owners and Pilots Association, Washington, DC ... 45
  Written statement ... 176
Willardson, Anthony G., associate director, Western States Water Council, Salt Lake City, UT ... 34
  Written statement ... 123
  Letter to Senator Baucus ... 136

ADDITIONAL MATERIAL

Page
- S. 1584 210
- S. 1792 213
- Statements:
  - Adams, Hon. Brock, U.S. Senator from the State of Washington 7
  - Hydra-Co 188
  - Montana Power Co 191
  - North Dakota Aeronautics Commission 198
  - Ochenski, George 202
  - Pacific Gas and Electric Co 203
  - Rural Coalition 205

JANUARY 14, 1988

- Reid, Hon. Harry, U.S. Senator from the State of Nevada, opening statement of 217

WITNESSES

- Bargen, Richard 233
  - Written statement 271
- Bark, Linda 226
- Cowan, Ed 227
- Davie, Brian, representing the Nevada State Legislature 242
  - Written statement 303
- Fulkerson, Robert, director, Citizen Alert 223
  - Written statement 265
- Hendy, Frederick, representing the Aircraft Owners and Pilots Association 244
  - Written statement 307
- Hornbeck, David 246
- Johndreau, Roy, representing Nebraskans for Peace, Concerned Tristate Citizens, and the Rural Coalition 250
- Johnson, Abbey, representing the League of Women Voters of Nevada 243
- Katunee, Katchanese, representing the Sacred Rainbow Circle Foundation 257
- Miller, Glenn 238
- Miller, Hon. Robert, Lieutenant Governor, State of Nevada 219
- Nadell, David 228
- Painter, Marla, director, Military Issues Task Force, Rural Coalition 222
  - Written statement 260
- Quilici, Donald, representing the Ornsby Sportmen's Association, Carson City, NV 229
- Robbins, Ed 231
  - Written statement 268
- Rossee, William, Sr., representing the Western Shoshone National Council 256
- Runner, Wally, conservation chairman, Sierra Club's North Carolina Coastal Group 248
  - Written statement 313
- Sferrazza, Hon. P., mayor, Reno, NV 222
- Sill, Marjorie, Sierra Club 239
- Smith, Frank, representing the Libertarian Party of Washoe County and the Campus Libertarian Society, the University of Nevada, Reno 251
- Spoo, Hon. J., mayor, Sparks, NV 221
- Strickland, Rose, chair, Toyiyabe Chapter, Sierra Club 225
- Wasson, Glenn B 255
- Watson, Charles, director, Nevada Outdoor Recreation Association 230
- Williams, Alice 253
- Wright, Fred, Nevada Wildlife Federation 240
- Additional statements submitted for the record:
  - Adler, Elisa 317
  - Appraisal Services 319
  - English, Dorothy 320
  - Rose, William, Sr 323
  - Overstreet, James I 324
  - Rhodes, Jennifer 325
  - Watts, Brian 327
  - Wolcott, Janet 329

COMPLIANCE WITH THE NATIONAL ENVIRONMENTAL POLICY ACT OF 1969 AND AUTHORIZATION OF APPROPRIATIONS FOR THE OFFICE OF ENVIRONMENTAL QUALITY

TUESDAY, NOVEMBER 24, 1987

U.S. SENATE,
COMMITTEE ON ENVIRONMENT AND
PUBLIC WORKS, SUBCOMMITTEE ON HAZARDOUS
WASTES AND TOXIC SUBSTANCES,
Washington, DC.

The subcommittee met, pursuant to notice, at 9:35 a.m., in room 406, Dirksen Senate Office Building, Hon. Max Baucus (chairman of the subcommittee) presiding.

Present: Senators Baucus and Reid.

OPENING STATEMENT OF HON. MAX BAUCUS, U.S. SENATOR FROM THE STATE OF MONTANA

Senator BAUCUS. The subcommittee will come to order.

When the National Environmental Policy Act became law in 1969, it put the phrase "environmental impact statement" squarely into the American vocabulary. More than any other law enacted as a result of Earth Day, NEPA has changed the way that Federal agencies do business.

Specific environmental laws have focused on problems such as clean air, clean water and hazardous waste, but it is NEPA and its environmental impact assessment that have brought decision-making into the open. The public can now be assured that environmental factors are considered when the Federal Government makes major decisions. In addition, as part of the decision-making process the Government must outline alternatives that will reduce environmental impacts.

NEPA is generally working. Its two basic objectives, decision-making in full public view and consideration of environmental impacts, are being met. The legislation being considered today recognizes that achievement and encourages the continuation of these goals. This has not always been the case. When NEPA was enacted, Federal bureaucrats did not embrace the law. Agencies were filled with experts committed to carrying out their mandates without interference. Public involvement in the consideration of all environmental factors was seen as an unnecessary intrusion into their actions.

The debates of the 1970's over what NEPA means and who is covered by it have largely subsided. The vast majority of Federal agencies give broad interpretation to NEPA and try to live by its letter and its spirit. However, some agencies still follow their own internal processes. Some still conduct their business behind closed doors and some make broad, sweeping statements about investigation that never occurs. Those are the agencies that we are, in part, going to focus on today.

The purpose of the hearing is to hear testimony on S. 1792, a bill to authorize appropriations for the Office of Environmental Quality for the years 1987 through 1989. This legislation makes a number of important changes in the way in which the Office carries out the requirements of the National Environmental Policy Act. We also will hear testimony on S. 1584, a bill to assure NEPA compliance in cases involving Special Use Airspace.

S. 1792 will clarify the question of who must follow the NEPA guidelines of the Council on Environmental Quality. We thought this issue was settled in 1979 when the Supreme Court handed down its decision in *Sierra Club* v. *Andrus*, but this May the Federal Energy Regulatory Commission proposed new regulations to implement NEPA. These regulations were based on FERC's interpretation that as an independent regulatory agency it was not within the jurisdiction of the Council on Environmental Quality.

The legislation we're looking at will make it clear that the Council is responsible for implementing NEPA and that its authority extends to all independent regulatory commissions.

The legislation also sets up a review procedure and requires a report to Congress on steps that are being taken to alleviate damage to fish and wildlife habitat. A basic purpose of NEPA is to identify ways to correct environmental damage. This report to Congress will allow the public to know how well we're doing with that job.

When we discuss S. 1584, introduced by my colleague, Senator Reid of Nevada, we will be looking at another aspect of NEPA. This legislation would clarify congressional intent that control of the Nation's airspace is the responsibility of the Federal Aviation Administration and that allocation of airspace belongs to the Federal Government.

I want to commend Senator Reid for introducing this legislation. It has special meaning for me. A few years ago one of our country's treasures was threatened when the Air Force chose to fly its jet fighters over Glacier National Park. The planes were buzzing the park as well as its scenic "Going To The Sun" highway on their flights to eastern Montana. After a protracted fight the Air Force agreed to move its flight path south of the park.

This legislation will ensure that these problems are addressed before they happen, not after the damage is done.

There is another concern that has been brought to this committee's attention that we will try to address, and that concern deals with overzealous bureaucrats who find ways to avoid both Congressional and public scrutiny through the use of "buzzwords." For example, the Department of the Navy uses the term "preliminary environmental assessments" and by doing so, the Department has been able to avoid public notice requirements.

The legislation before us also provides that States be given enough time to certify that actions proposed by the Federal Energy Regulatory Commission do not violate the standards of the Clean Water Act. Recently FERC changed its rules in a way that denies States a full opportunity to review hydroelectric projects. As a result, States may not be able to determine if some important energy projects meet Federal clean water standards.

States have the primary role in implementing the Clean Water Act. Congress intended that they be given sufficient opportunity to exercise that authority. FERC's decision to make that review process more difficult is not tolerable. It will be our duty here today to determine if FERC's action violates either the spirit or the intent of NEPA.

Senator BAUCUS. We are honored this morning to have in attendance Senator Reid from Nevada.

Senator, do you have a statement?

OPENING STATEMENT OF HON. HARRY REID, U.S. SENATOR FROM THE STATE OF NEVADA

Senator REID. Thank you very much, Mr. Chairman. I really appreciate your arranging this hearing in the throes of this busy Senate schedule.

Mr. Chairman, in representing Nevada I take special pride in the efforts being conducted by the military in my State. Two of the most advanced—if not the most advanced--"top gun" pilot training bases in the world are located in the State of Nevada. In the south it's Nellis Air Force Base, which is located—it used to be near Las Vegas, and it seems now to be right in Las Vegas, and in the north, the Naval Air Station at Fallon which is east of Reno by some 55 or 60 miles.

Nowhere else in the world can our best military aviators receive their Ph.D.'s in air combat operations using live bombs, missiles, and ammunition. Even the Thunderbirds, the Air Force's ambassadors to the world, perfect their precision flying routines in the desert skies above Indian Springs, Nevada.

Nevadans are proud to have given for so long to maintain a strong national defense posture. Until recently we didn't question the necessity of the need to continually give.

Recently, though, Mr. Chairman, we've begun to question. The military, whom Nevadans have always respected and admired and were always willing to support, began to abuse this respect and trust that we had developed, some believe. To some, the guest became an intruder. No longer did the military act as a fair, honest, caring partner with my State, but began to arrogantly demand compliance with seemingly arbitrary decisions. They began to take more and more without even asking, and demanding more.

Mr. Chairman, this hearing today relates to airspace, but how I first got interested in airspace was at a time when the military without question—contrary to law—just took a large chunk of Nevada land. It was then that I determined how they were able to do that legally—of course, under the Engel Act—and I thought, well, if they are able to do this with land, how do they do it with air? It was much easier to take airspace than it was land space.

So I saw this insensitivity to local interests when the military recently took the Hart Military Operations Area, or MOA—and just for clarification, Mr. Chairman, a MOA is one of the five categories of military airspace. The Federal Aviation Administration calls military airspace "Special Use Airspace." I've found that knowing the terminology used by the military and the FAA, or getting past the so-called "fog factor," is important in understanding this issue because it is often used to hide or mask what is really going on.

I discovered with the Hart MOA withdrawal that constituents, be they environmentalists, State aviation officials, county land managers, small airplane owners and pilots, farmers, university people, ranchers, or commercial aviation representatives were denied any meaningful opportunity to participate in the airspace withdrawal process.

Mr. Chairman, I was involved in these matters when I served in the House of Representatives, and I could not attend the hearing that was held at a very remote area for this hearing, so I sent my wife and my son to attend as witnesses at this so-called "informal hearing" on this Special Use Airspace withdrawal. They found that, like most everyone else, that although allowed to speak, they were told that what they said would have no impact at all on the process. What the military had requested was simply rubber-stamped "approved" by the FAA as satisfying the National Environmental Policy Act. No environmental assessment or environmental impact statement were accomplished, and that's an understatement; simply, a finding of "no significant impact" was filed by the military, not the FAA. I am still astonished with the callousness of the FAA approval process for military Special Use Airspace.

To rub salt in the wounds, Mr. Chairman, this was an Oregon Air National Guard unit flying over Nevada airspace.

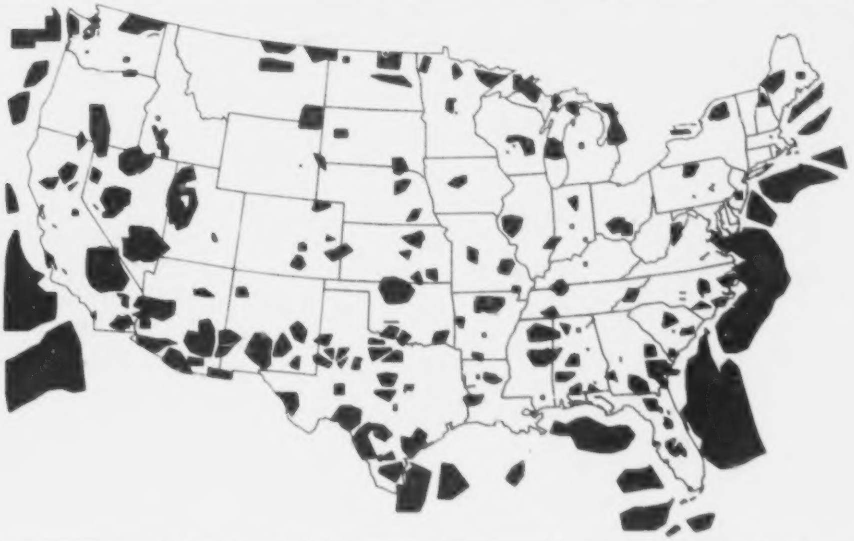
This problem of increasing demands for military airspace without meaningful review is not restricted to Nevada, or even the west. Increasing military use of America's finite amount of airspace has created problems for other airspace users, represented by environmental and civilian aviation groups.

Chart 1 that I have behind me indicates that in the last 10 years, designating airspace as military Special Use Airspace has increased over 50 percent. Now 900 areas fall within some kind of military limitation. In terms of square miles, the increase has been over 34 percent. More than one million square miles of airspace over the United States fall within some kind of special military control.

MILITARY SPECIAL USE AIRSPACE

	1978	1987	INCREASE
TOTAL NUMBER	**598**	**900**	**302 (50%)**
SQUARE MILES	**793,373**	**1,063,957**	**270,584 (34%)**

Senator Reid. Chart number 2—this map of the United States shows how much area military Special Use Airspace covers today. Here you have overlaid on a map of America the three major categories of military Special Use Airspace—restricted, warning, and military operation areas. To say the least, Mr. Chairman, that's a graphic representation and it does indicate that Nevada is not the only affected State.



Special Use Airspace:
All Three Types

Senator REID. I've always said, Mr. Chairman, if you control the air you control the land below. Looking at this map of the United States it amazes me that with all the control the military now exercises they would actually want more. Because of the tremendous increase in the control the military exercises through Special Use Airspace and military training routes, there is now strong concern that current loopholes in the law have allowed the military to go relatively unchecked in acquiring and keeping airspace. The reasoned balance between Defense and non-Defense interests has been weighted too heavily by the FAA in favor of Defense, and the problem will be getting worse. In addition to the military's desire for more airspace, the FAA estimates that by the year 2000 commercial and private flight use will more than double. Certainly by the year 2000 the population beneath and around military Special Use Airspace areas and military training routes will significantly increase.

It is imperative, therefore, that the interests of those other than the military—including the civilian aviation community, State and county aviation and environmental officials, national and local environmental protection groups and organizations, rural coalitions, ranching and farming associations, and the public in general—have an opportunity to participate actively in the process and to determine what airspace is to be taken and remain out of full citizen use, and for how long.

Part of the purpose of this hearing, Mr. Chairman, as you've mentioned, is to determine if environmental interests of those other than the military are adequately being protected by current law and, if not, whether S. 1584 appropriately modifies the National Environmental Policy Act, or NEPA, to protect those vital interests adequately.

I look forward to our panelists providing that valuable information.

This week is one of the heaviest—if not the heaviest—air-traveled week of the year. With a deregulated airline industry and thousands of people flying to visit friends and family on Thanksgiving, I wonder now many near-misses will occur. Some of those will occur because of military squeezing of already-limited airspace. How many passengers, pilots and aircrew members will be endangered? How many families will be placed at risk because of the over one million square miles of airspace?

I certainly, as we all do, hope that this hearing today focuses on this problem and that it will focus on the fact that not only is the military affected, but millions and millions of passengers who travel this country all the time and who are certainly impacted during a week like this week.

If this unchecked growth in military Special Use Airspace and military training routes is not closely monitored, there will soon come a day when there will be problems that none of us want to develop. Hopefully this hearing will help avoid these problems.

Senator BAUCUS. Thank you, Senator, very much.

I have a statement from Senator Brock Adams supporting S. 1584 which will be made part of the record at this point.

[The statement referred to follows:]

Brock Adams

STATEMENT BY SENATOR BROCK ADAMS IN SUPPORT OF S. 1584

Mr. Chairman, I am pleased to offer my support to S. 1584, which will require compliance with Section 102(2)(C) of the National Environmental Policy Act of 1969 (NEPA) prior to the designation of any special use airspace. NEPA requires that any major Federal Action significantly affecting the quality of the human environment must be preceded by a detailed statement. Such statement must define the environmental impact of the proposed action, any adverse environmental effects resulting from the action, and alternatives to the proposed action.

This legislation would primarily affect military use of airspace. Military flyers currently train in areas designated as special use airspaces, which are off-limits to civilian and commercial flights. Currently, the withdrawal of public use from these special use airspaces is an administrative process involving the Secretaries of Defense and Transportation. The effect of the new designation on civilians living below the airspace has been largely ignored in this process. This legislation would require that the impact on civilians be considered before airspace is withdrawn or the existing use is altered.

My sponsorship of this legislation does not diminish my support for and recognition of our Nation's need for a strong defense. Our military pilots must have the necessary airspace in which to train, in order that they be adequately prepared to defend this country should the need arise. But the land and people they are sworn to defend must also be protected.

This legislation recognizes that use of airspace has a significant effect on the people who live and work beneathe it. In Nevada, people are subjected to hundreds of sonic booms each day, caused by low-altitude supersonic flights. In Washington, the continual touch-and-go landings by Navy fighter jets have shattered the lifestyles of residents of Whidbey Island. The base at Whidbey houses the EA-6B carrier squadrons for the entire nation and is home base for the A-6 planes on the West Coast. Usage of the military airfield has increased 260% in recent years, and residents complain that the Navy has not been responsive to their complaints about the noise from flights which continue into the early morning hours. This legislation would require that before such an increase in usage is permitted, the Navy must consider the effects on the local community and prepare an environmental impact statement detailing those effects. A change in designation or usage would be permitted only after the Department of Transportation, through the Federal Aviation Administration, determined that the action was in compliance with NEPA.

This legislation does not prevent military withdrawal of airspace. It merely requires that human interests be considered before such designations are made. In doing so, it assures that America's military defense needs are balanced against the needs of those whom the military is defending. I am pleased to join with my colleague Senator Reid in sponsoring this legislation and I urge its swift passage into law.

Senator BAUCUS. We will now hear from our panelists. Our first panel includes Michael Schopf from the Federal Energy Regulatory Commission; Mr. Sanderson, with the Environmental Protection Agency; Commander Rick Rice, Department of the Navy; Ms. Lucinda Swartz, Council on Environmental Quality; and John Ryan, with the Federal Aviation Administration.

Mr. Schopf, why don't you begin?

STATEMENT OF MICHAEL SCHOPF, FEDERAL ENERGY REGULATORY COMMISSION, ACCOMPANIED BY FRED E. SPRINGER, ACTING DIRECTOR, FERC OFFICE OF HYDROPOWER LICENSING

Mr. SCHOPF. Thank you, Mr. Chairman.

Mr. Chairman and members of the committee, I am pleased to appear before you to explain the Commission's decisions interpreting the period in which State agencies may exercise their certification functions under Section 401 of the Clean Water Act. My name is Michael Schopf, and I am FERC's Associate General Counsel for Enforcement, General Law and Rulemaking. With me today is Fred E. Springer, Acting Director of the FERC Office of Hydropower Licensing. We appreciate this opportunity to provide technical comments to the committee.

I would like to state at the outset that Mr. Springer and I are appearing as technical staff witnesses. Our views do not necessarily represent those of the Chairman or any individual member of the Commission.

Section 401 of the Clean Water Act prohibits Federal agencies from licensing facilities that may discharge pollutants into the navigable waters of the United States unless the applicant for the license has secured a certification from the appropriate State agency or interstate pollution control body that any discharge will comply with the water quality standards of the Clean Water Act. However, the act explicitly provides that the certification requirement is deemed waived if the State has failed to act on the request for certification "within a reasonable period of time (which shall not exceed one year) after receipt of such request." The one-year period mentioned in the statute is thus an outer limit; Congress clearly contemplated that a "reasonable period" for State action could be less than one year.

The legislative history indicates that this deadline was imposed by Congress "to do away with dalliance or unreasonable delay" by the certifying agencies. In a 1984 decision, Washington County Hydro Development Associates, the Commission construed this time period to begin running on the date the State accepted the request for certification, not the date the request was received. It soon became apparent, however, that the States differed widely in their interpretation of when a certification request was accepted. Some read it narrowly to require only some basic filings; some read it to mean when a requester's filings were substantively acceptable; still others, when a State had completed its overall environmental review of the project, not merely the clean water elements of that review. As a result, the Commission reexamined its interpretation of the statutory deadline for State certification in a rulemaking proceeding.

In a notice of proposed rulemaking issued on August 6, 1985, and in its final rule, Order No. 464, the Commission changed the Washington County interpretation and construed section 401 to mean that State certification would be waived if not exercised within one year after the State received the certification request. The Commission found that the new interpretation better conformed to the clear text of the statutory waiver provision and to the Congressional purpose in imposing a deadline in the first place—to prevent undue delay by certifying agencies.

Because Order 464 involved the legal interpretation of a Congressional deadline, the Commission explained that the new interpretation would apply to hydroelectric applications still pending before the Commission as well as to future applications. Order 464 also directed the staff to notify State agencies that in any situation where Order 464 had the effect of deeming certification to be waived, the agencies had until June 10, 1987 to submit comments and recommendations on water quality. The State agencies were also to be informed that the Commission would consider including in its own licenses any water quality conditions recommended by the State agencies. Although the States had a right to petition for rehearing and, in those petitions, to object to the new interpretation or to its application to pending cases, no timely petitions for rehearing of either conclusion were filed.

However, more than a month after the period for rehearing had run, the Commission received petitions from five States—New York, Washington, California, Alaska and Maine—asking the Commission to reconsider its decision to apply the new interpretation to pending applications. My prepared remarks at this point indicate that the Commission would be considering those petitions this morning. In fact, the Commission reached a decision late yesterday; by a three-to-two vote the Commission dismissed the petitions on the procedural grounds that they were clearly untimely petitions for a rehearing. In a dissenting statement, Chairman Hesse and Commissioner Naeve indicated that they would have given the States a reasonable period in which to grant or deny certification in those cases still pending before the Commission.

In conclusion, Mr. Springer and I would be happy to provide any technical assistance you may need in the course of your deliberations on this legislation. We would be happy to try to answer any of your questions at this time.

Senator Baucus. Thank you very much, Mr. Schopf.

Mr. Sanderson, why don't you go next?

STATEMENT OF RICHARD E. SANDERSON, DIRECTOR, OFFICE OF FEDERAL ACTIVITIES, U.S. ENVIRONMENTAL PROTECTION AGENCY

Mr. Sanderson. Good morning, Mr. Chairman, Senator Reid. I am pleased to appear before you today to discuss EPA's experience with the National Environmental Policy Act.

At the outset you should know that several questions that were sent to me before the hearing did not arrive in time for inclusion in the responses in my prepared statement owing to the lead time necessary for interagency review. I would be pleased, however, to respond to those and other questions following a summation of my prepared statement.

My office in the Environmental Protection Agency, the Office of Federal Activities, works with other Federal agencies to assure that all their activities are planned and implemented in an environmentally sound manner. We also carry out two EPA programs involving NEPA: compliance with NEPA within EPA itself, and the environmental review of other Federal agencies' activities pursuant to NEPA under section 309 of the Clean Air Act.

This section requires EPA to review and comment on all major Federal actions subject to NEPA, proposed regulations, and the Administration's legislative proposals.

Regarding EPA's compliance with NEPA, the agency is responsible for construction grants and the NPDES permit programs under the Clean Water Act, as well as research and development programs and facilities support activities. Otherwise, the agency is exempt from NEPA under the Clean Water Act and the Clean Air Act.

Beyond these statutes, the agency has a longstanding and court-supported policy governing which of its actions will get NEPA or NEPA-equivalent review.

Regarding Section 309 review, if the Administrator finds a reviewed action unsatisfactory from a standpoint of public health and welfare or environmental quality, he publishes his determination and the matter is referred to the Council on Environmental Quality.

Section 309 applies whether or not the agency proposing an action prepares an environmental impact statement. A summary description of EPA's 309 review process is attached to my prepared statement.

My office also performs these other services: the administering of the information management system for the filing of all Federal environmental impact statements; serving as the repository of information on techniques and methodologies for environmental impact assessments; and monitoring Federal agency compliance with environmental statutes and Executive Orders.

Federal agency implementation of NEPA is guided by the Council on Environmental Quality regulations published in 1978. S. 1792, section 101, would clarify that the regulations are binding, in our opinion, throughout the Federal Executive Branch.

In general, Federal agency implementation of NEPA recognizes three levels of potential impacts: insignificant, permitting categorical "exclusions" from NEPA requirements; unclear, requiring the preparation of environmental impact assessments to determine if significant impacts would occur; and significant, requiring an environmental impact statement. In practice, 10,000 to 20,000 environmental assessments are prepared each year, but only 300 to 500 draft environmental impact statements and final environmental impact statements are prepared annually.

An environmental assessment may often prompt an Agency to prepare mitigation plans to reduce environmental impacts of their actions. If an agency's environmental impact statements are of high quality, it has been our experience that the agency is implementing its categorical exclusion and environmental assessments satisfactorily, as well.

Overall, the quality of Federal agencies' final environmental impact statements has been good. While the environmentally preferable option is not always chosen, the final selection generally take into account NEPA environmental analysis. We also believe that, there has been an increasing willingness of Federal agencies to accept recommendations at the draft environmental impact statement stage.

Thus, NEPA has succeeded; Federal decision-makers consider environmental issues in their decision-making process. The task that remains is continued support of NEPA through education, encouragement, and assistance to managers who must ensure that their agencies meet the requirements of the National Environmental Policy Act.

This concludes my summation. My entire statement has been submitted for the record.

Senator BAUCUS. Thank you very much, Mr. Sanderson.

The next witness is Commander Rice from the Department of the Navy. Commander?

STATEMENT OF CMDR. RICHARD H. RICE, USN, DIRECTOR, ENVIRONMENTAL PROTECTION, SAFETY, AND OCCUPATIONAL HEALTH DIVISION, OFFICE OF THE DEPUTY CHIEF OF NAVAL OPERATIONS FOR LOGISTICS, ACCOMPANIED BY DICK EDDY, ASSISTANT GENERAL COUNSEL FOR ENVIRONMENTAL LAW, OFFICE OF THE GENERAL COUNSEL, U.S. NAVY; AND TOM PEELING, SPECIAL ADVISOR FOR ENVIRONMENTAL AFFAIRS, NAVAL FACILITIES ENGINEERING COMMAND

Commander RICE. Mr. Chairman, I am Commander Rice, as you stated, from the United States Navy. I am Director of the Environmental Protection, Safety and Occupational Health Division in the Office of the Deputy Chief of Naval Operations for Logistics. Thank you for the opportunity to discuss the Navy's implementation of the National Environmental Policy Act.

Joining me today are Mr. Dick Eddy, Assistant General Counsel for Environmental Law, Office of the General Counsel of the Navy, and Mr. Tom Peeling, Special Advisor for Environmental Affairs at the Naval Facilities Engineering Command.

Your staff has provided questions regarding specific procedures within the Navy's overall NEPA compliance process. These questions relate specifically to the Navy's use of Preliminary Environmental Assessments, or PEA's.

A PEA is the Navy's planning tool to sensitize commanders to the necessity for an evaluation of the potential environmental consequences of a proposed action and to assist in determining what degree of examination those concerns merit. It also serves to meet the intent of the NEPA regulations by commencing integration of the NEPA process with other planning at the earliest possible time to ensure that planning and decision-making reflect environmental values, to avoid delays later in the process, and to head off potential conflicts. It is the mechanism by which the Navy requires the proponent of every project, however small, to make a threshold determination early on in the planning process as to the project's potential for environmental consequences and the significance of those consequences.

The PEA and its predecessor, the environmental impact assessment, have been in use since 1974 and have proven to be effective starting points to ensure a systematic, interdisciplinary approach in planning and decision-making which may have an impact on man's environment.

With regard to your question on the number of PEA's, EA's, and EIS's prepared by the Navy in 1986, we estimate that approximately 950 PEA's were prepared. Thirty-five environmental assessments and eighteen EIS's were initiated, but not all of these were completed in 1986.

In response to your question concerning military construction projects, the Navy's fiscal year 1988 Military Construction and Family Housing programs for projects in the United States as submitted in the President's budget contain 223 projects for which 9 EIS's, 10 EA's and 204 PEA's were prepared. The PEA's were used with respect to minor projects with little or no impact potential. Projects for which PEA's apply include structural rehabilitation; additions to existing structures; energy conservation modifications; utility upgrades and connections; security improvements, and fire protection.

The PEA documents the thought process and interagency coordination, when appropriate, that were included in a decision and does not pre-empt the NEPA process, nor does it take the place of an EA or EIS when those are warranted.

I hope I have been responsive to your questions and I thank you for the opportunity to discuss these issues with you. I will be pleased to answer any additional questions you may have, sir.

Senator BAUCUS. Thank you very much, Commander.

Our next panelist is Lucinda Swartz with the Council on Environmental Quality. Ms. Swartz.

STATEMENT OF LUCINDA LOW SWARTZ, DEPUTY GENERAL COUNSEL, COUNCIL ON ENVIRONMENTAL QUALITY

Ms. SWARTZ. Mr. Chairman, on behalf of the Council on Environmental Quality and Chairman Hill, I thank you for the opportunity to offer testimony in support of the reauthorization of the Office of Environmental Quality.

As you know, the Council on Environmental Quality (CEQ) was permanently authorized under the National Environmental Policy Act. The Office of Environmental Quality, however, which was established under the Environmental Quality Improvement Act to provide support for CEQ, needs periodic reauthorization.

My prepared testimony this morning simply addresses the several questions you posed regarding promulgation of NEPA regulations by the Federal Energy Regulatory Commission, the Department of the Navy's use of Preliminary Environmental Assessments, and the Federal Aviation Administration's compliance with NEPA in designating Special Use Airspace. In addition, Chairman Hill has submitted a statement for the record. I will summarize both Chairman Hill's statement and my testimony and then will be pleased to answer any questions.

As described in Chairman Hill's statement, CEQ has divided its responsibilities into three categories: environmental policy analysis and development, interagency coordination of environmental quality programs, and environmental data acquisition and assessment.

The first program, environmental policy analysis, is carried out primarily by the three Council members and includes providing expert opinion and policy advice to the President; preparing the annual Environmental Quality Report, and coordinating international environmental issues.

In its interagency coordination function, CEQ reviews other agencies' NEPA procedures, responds to requests to examine NEPA compliance for specific projects, and participates in multiagency groups such as the Interagency Task Force on Acid Precipitation.

The environmental data acquisition program focuses at the present on the preparation of a second Environmental Trends sourcebook. This project, involving about 20 different Federal agencies, seeks to update information about environmental data sources. The report is scheduled for completion in the near future.

Under Executive Order 11991, CEQ was given authority to issue regulations, to be binding on all Federal agencies, to implement the procedural provisions of NEPA and to provide a referral process to CEQ of conflicts between agencies concerning NEPA implementation. Such regulations were issued in 1978. Since that time, guidance in interpreting certain aspects of the regulations has been issued, and in 1986 an amendment to the incomplete or unavailable information regulation was promulgated.

One of the most important NEPA issues which came before the three Council members in 1987 was the referral from EPA concerning a proposal by the Army Corps of Engineers to amend its NEPA regulations. There were several points of controversy on which CEQ took both oral and written comments; then, in late May of 1987, CEQ issued its recommendation. A copy of that recommendation is attached to Chairman Hill's statement.

The application of NEPA to the areas of biotechnology and genetic engineering, as well as to the cleanup of Federal facilities under Superfund, are other increasingly important NEPA issues which the Council is reviewing.

In the international arena, CEQ's primary activity recently has been to coordinate Federal activities concerning the World Commission on Environment and Development. Additional international issues being reviewed by the Council are the problems of global warming and stratospheric ozone depletion. We have held several public meetings to brief the Council members on the scientific issues and environmental impacts involved. We are planning other meetings so that we can examine Federal agency responses to this growing concern.

CEQ, with the Department of State, also has oversight authority over implementation of Executive Order 12114 which directs all Federal agencies to prepare environmental review documents for major Federal actions significantly affecting the environmental quality of the global commons, or foreign nations, under certain circumstances. In the past, CEQ has published progress reports on agency procedures implementing this Executive Order, and we have recently undertaken another comprehensive examination of Federal agency implementation.

As described in my testimony, in the past year the CEQ staff has been working with the FERC staff concerning that agency's promulgation of regulations to implement NEPA. FERC has taken the position that as an independent Federal agency it is not bound by the regulations promulgated by CEQ.

In May, 1987 FERC proposed draft regulations to implement NEPA. Although CEQ had some serious concerns with the draft, I have held discussions recently with FERC staff and have learned that the staff intends to recommend to the full Commission that the agency adopt the CEQ regulations. CEQ commends the staff for the care and thought given to all the comments they received on the draft regulations, and it is hopeful that the full Commission will approve the staff's recommendation.

Another NEPA compliance issue with which the Council has been concerned is the Navy's use of Preliminary Environmental Assessments. These PEA's are not public documents, and there is some concern that they are being used in place of environmental assessments and environmental impact statements, both of which are public documents. At a minimum it appears that the Navy has been using PEA's to justify the use of two overly-broad categorical exclusion categories. CEQ has asked the Navy to amend its regulation to delete the two extensive categorical exclusions and to explain more fully its use of PEA's.

Finally, CEQ has also had discussions and exchanged correspondence with the FAA regarding that agency's NEPA compliance for Special Use Airspace designations. It has come to our attention that the FAA merely looks to see if the requesting military agency has certified NEPA compliance. The FAA does not prepare an environmental assessment or an EIS, nor does it review any environmental documentation prepared by the requesting military agency. In our legal opinion, the FAA has the responsibility under NEPA to independently evaluate the scope and the content of the environmental documentation prepared by the requesting agency. We have not yet asked the FAA to amend its regulations but have indicated that we plan to pursue this matter and that a regulatory amendment may be necessary.

That concludes my remarks.

Senator **Baucus**. Thank you, Ms. Swartz.

The final panelist is Mr. John Ryan with the Federal Aviation Administration. Mr. Ryan.

STATEMENT OF JOHN RYAN, FEDERAL AVIATION ADMINISTRATION

Mr. **Ryan**. Thank you, Mr. Chairman, members of the committee. I do not have a prepared statement but I would be pleased to present the FAA's views on S. 1584.

While the FAA fully supports the National Environmental Policy Act, we are strongly opposed to S. 1584. Our objections to the bill are as follow.

If enacted, the bill would impose substantial increases in administrative workload and budgetary expenditures which would divert critical FAA resources from important aviation functions.

The bill would necessitate virtually constant rulemaking, amendment actions, and would not be responsive to valid Department of Defense training and national security requirements or the requirements of other users of the national airspace system.

Section 2(a) of the bill would also require the designation or the expansion of Special Use Airspace to be defined as a "major Federal action." We find that provision particularly troublesome since it would impose an extensive rulemaking process, including an environmental impact statement, for even minor Special Use Airspace designations or amendments which would hamper DOD training efforts and their ability to adjust operational requirements.

The FAA currently reviews all Special Use Airspace proposals to determine whether military requirements can be accommodated within or by modifying existing Special Use Airspace areas. Requiring an environmental impact statement would virtually eliminate current FAA/DOD flexibility to adjust or modify Special Use Airspace, even if such efforts were to reduce the existing SUA.

We also oppose Section 2(b), which would designate the FAA as the lead agency for compliance with NEPA in connection with Special Use Airspace. The dominant impact on the environment is the military mission for which the airspace is designated. We believe the DOD is uniquely qualified to address the alternatives and environmental impacts in relation to the military mission. In fact, the action choices—which are the heart of the environmental impact statement—could involve classified information that DOD may not share with the FAA.

Requiring the FAA to assume the lead agency role would impose an expensive and duplicative task. Under longstanding procedures, DOD has acted as the lead agency with respect to Special Use Airspace action compliance with NEPA. We believe that DOD, as a Federal agency with independent NEPA responsibility, properly functions as lead agency in accordance with current regulations for implementing NEPA.

Section 2(c) would require that actions involving Special Use Airspace designations be subject to the rulemaking procedures contained in the Administrative Procedures Act, 5 USC 553. Currently, only prohibited and restricted areas are subject to rulemaking procedures. These areas restrict access to airspace based on national security and welfare needs, or to protect nonparticipating aircraft from hazardous activities. The remaining categories of Special Use Airspace are considered nonrulemaking airspace actions because they do not restrict aviation activities.

Nonrulemaking procedures, however, do provide for public participation and comment before final decisions are made. Extension of rulemaking procedures to include present nonrulemaking categories of Special Use Airspace would, again, impose a substantial administrative workload which would drastically slow the Special Use Airspace process and seriously jeopardize DOD initiatives.

Finally, with regard to Section 3, we believe it is unnecessary to review semi-annually each and every designated Special Use Airspace. With the exception of prohibited and warning areas, the

FAA currently reviews at a minimum all Special Use Airspace on an annual basis. Currently, there are over 800 Special Use Airspace areas. Since it currently takes an average of six months to process any SUA action, we believe that an annual review is a more realistic and attainable goal than a semi-annual review requirement.

In conclusion, Mr. Chairman, we believe that S. 1584 if enacted would contribute little to either the environmental process or the efficiency of the national airspace system. It would add unnecessary expense, time and complexity to the Special Use Airspace process without discernible benefits to the public while limiting the FAA's ability to make airspace adjustments and curtailing military training activities.

I would now be pleased to respond to any questions you may have.

Senator BAUCUS. Thank you all very much.

Ms. Swartz, as the representative of the Council on Environmental Quality, you stated earlier that you believed that the Federal Energy Regulatory Commission generally should comply with the National Environmental Policy Act. Is that correct?

Ms. SWARTZ. That's correct.

Senator BAUCUS. Is it the general view of the Council on Environmental Quality that all agencies should comply with the National Environmental Policy Act?

Ms. SWARTZ. We've taken the position that our regulations are binding on all Federal agencies, and independent regulatory agencies as well.

Senator BAUCUS. So you make no distinction between executive agencies and so-called "independent regulatory agencies"? You think that they all should comply?

Ms. SWARTZ. Exactly.

Senator BAUCUS. As I understand you, you also are saying that the staff of the Federal Energy Regulatory Commission and you and perhaps others at the CEQ have informally agreed that FERC staff will recommend to the Commission that the Commission comply with the act in the same degree as other executive and regulatory agencies, that they should comply with NEPA. Is that correct?

Ms. SWARTZ. Yes. The staff draft that I've seen indicates that FERC will voluntarily comply with all of CEQ's regulations. They will also implement their own agency regulations, which our CEQ regulations require, indicating which actions will require the preparation of an environmental impact statement, which will require preparation of an environmental assessment, which actions are categorically excluded, and some other agency-specific regulations, all of which CEQ finds in compliance with both its regulations and the National Environmental Policy Act.

Senator BAUCUS. In the view of the CEQ are there any agencies whose compliance with NEPA is questionable?

Ms. SWARTZ. We frequently get calls and letters on just about every agency on specific projects. I can't come up with one agency that's notoriously bad. There are some agencies that we seem to have more problems with than others, and we try and take those just one at a time and work out the individual situations. For example, when we received a letter regarding the Navy's use of one of their categoric exclusions, which we consider overly broad, and their preliminary environmental assessments, we took it up with the Navy and have been trying to work it out with them.

Senator BAUCUS. Other than agencies which might or might not be notoriously or egregiously not in compliance with the act or whose compliance is questionable, do some come to mind? I'm not asking you to single out one or two or three for special condemnation——

Ms. SWARTZ. I didn't want to name names.

Senator BAUCUS [continuing]. But I think it's important at this hearing and it's important for the public to know which agencies, at least in the view of the CEQ, are not complying to the degree that, in the view of the CEQ, they should.

Ms. SWARTZ. I think in the view of the CEQ, there are no Federal agencies that simply are not complying with either our regulations or with the National Environmental Policy Act. There are agencies that seem to have more compliance problems than others, although—for example, back in the early- to mid-1970's when NEPA was implemented the Forest Service, as I recall, had a great deal of difficulty. Now they are one of the best agencies for NEPA compliance. So I think that maybe these things——

Senator BAUCUS. The agencies that are presenting more problems than others, are those agencies presenting significantly greater problems of compliance? Or are they all insignificant?

Ms. SWARTZ. I certainly wouldn't call them insignificant. I would call them site-specific. In particular circumstances an agency hasn't done what perhaps they should have done in complying with NEPA.

We also frequently get information on specific actions where we may disagree with the agency's approach and they perhaps could make a better decision or they perhaps could do more than what is actually required by the statute and our regulations. We certainly can't force them to do it. We can suggest that it might be the better part of valor to do it, and we do that frequently on an informal basis.

Senator BAUCUS. Could you provide a list of the agencies which, in the view of the Council, have presented significant problems of compliance?

Ms. SWARTZ. Yes.

Senator BAUCUS. Mr. Schopf, I would like you, if you could, to confirm the understanding that Ms. Swartz has with respect to discussions between the staff of the agency and the Council about the staff's intention to recommend to the Commission that they comply with the act. Could you expand on that a bit?

Mr. SCHOPF. Yes. There is a staff draft of a final Commission NEPA rule which we have consulted with CEQ about. The draft final rule would have the Commission voluntarily comply with CEQ regulations.

Senator BAUCUS. Could you submit us a copy of that draft, please, for the record? I understand—Ms. Swartz mentioned a staff memorandum which the staff is about to send to the Commission.

Mr. SCHOPF. Yes, I think we can submit that. Since it is a pending proceeding before the Commission, we might just ask that the thing be kept confidential. That would be up to the Commission, I guess.[1]

Senator BAUCUS. Is it the view of the staff that FERC should fully comply with NEPA?

Mr. SCHOPF. It is the view of the staff that the Commission should voluntarily comply with CEQ regulations (there is no question that FERC must comply with NEPA), but I do have to say that with the CEQ regulations themselves indicate that they are not binding to the extent that they are inconsistent with an agency's statutory requirements. So we are voluntarily complying with CEQ regulations on that understanding.

Senator BAUCUS. Could you indicate which agency statutory requirements, in the view of the staff, are inconsistent with NEPA?

Mr. SCHOPF. Well, in the notice of proposed rulemaking that the Commission issued last May, the Commission expressed some concern about two provisions. One is a referral provision in the CEQ regulations whereby other agencies could refer, say, a proceeding before the FERC to the CEQ. The Commission had some questions about that, whether that was consistent with our statutory obligations, particularly in an adjudication. I think that was the major problem we had, and I think we've resolved that, at least at the staff level.

Senator BAUCUS. What about the Executive Order which generally provides that all agencies comply, and also the court decision of *Sierra Club* v. *Andrus* which generally provides that all agencies comply? Don't those two items indicate that FERC should comply to the same degree as all other agencies?

Mr. SCHOPF. Well, I would differentiate between the question of whether the Commission should as a matter of policy voluntarily comply with CEQ regulations and the issue of whether or not it is legally bound to comply. The Commission has no position on the latter issue as of now. There is no Commission position, and we felt we didn't need to address it because we were recommending that the Commission voluntarily comply anyway.

In 1979, when the issue first arose, the Commission did say at that time in a notice of proposed rulemaking that it was not bound as a matter of law, and that position was a fairly common position among independent regulatory agencies since the binding character of the CEQ regulations is based on an Executive Order and at that time various independent regulatory agencies questioned whether it was legally binding on them. I know Ms. Swartz mentioned that it was our position that we are not legally bound. At this point I don't think the Commission has a position on whether or not we're legally bound.

Senator BAUCUS. What is the position of the staff?

Mr. SCHOPF. The staff likewise has no position.

Senator BAUCUS. Why not?

Mr. SCHOPF. Because our position is that the Commission should voluntarily comply anyway, so we didn't need to address it.

Senator BAUCUS. What's the staff position as to the law?

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[1] The material referred to has been received and is retained in committee files.

Mr. **Schopf**. We haven't presented the Commission with a legal position.

Senator **Baucus**. I'm asking you.

Mr. **Schopf**. I don't have a legal position, either.

I think it's a difficult "separation of powers" question. We've never felt that we needed to get into it.

Senator **Baucus**. I think, frankly, that's a distinction without a difference. It seems clear to me that Executive and independent regulatory agencies should all comply. They are all agencies of the Government. All agencies serve the public. Sure, different agencies have different jurisdictions, but essentially they all serve the public and most agencies—probably all agencies—to one degree or another either do or potentially affect the environment.

I think it's absolutely clear what the policy should be. I think it's clear what the law is. Although it is true that the United States Supreme Court has not ruled squarely and precisely on that point, I think it's clear what the policy should be and I think it's clear how the Court would rule if it were faced precisely with that question.

So I encourage the Commission and all agencies, including independent regulatory agencies—which really aren't that independent anyway—to fully comply.

Thank you very much.

Senator Reid?

Senator **Reid**. Thank you, Mr. Chairman.

Listening to Ms. Swartz, we'd better be careful. She may be running for one of our jobs the way she answered that question. She was very diplomatic. She could have given a little more information about agencies that maybe weren't complying.

Senator **Baucus**. Hopefully, she's going to supply it for the record.

Ms. **Swartz**. I would be happy to talk about specific circumstances and particular problems that we have.

Senator **Reid**. But of course, that's difficult for us to do, to talk about specific circumstances. That's why we've asked you to come before us, because we can talk about general things and complaints that we receive on a general basis, but we need help from agencies. Even though you were unwilling to supply specific information, I think that is something that would be of help to the committee. I think you indicated that you would supply in writing agencies who weren't complying. Whatever information you give us I am sure will be a help.

Let me ask you some specific questions. Has the FAA fully accomplished its responsibilities in regard to NEPA compliance?

Ms. **Swartz**. With respect to Special Use Airspace designations?

Senator **Reid**. Yes.

Ms. **Swartz**. We don't believe so. It's our understanding that in looking at a request for Special Use Airspace designation, the FAA considers the requesting military agency to be the agency responsible for NEPA compliance.

Senator **Reid**. Do you think that's right?

Ms. **Swartz**. I think the FAA, in making its decision on whether to make the designation, needs to do its own NEPA compliance. They may rely on environmental documentation done by the requesting military agency, but they have an independent responsibility under NEPA to evaluate the scope and the content of the environmental documentation that has been done by the agency. They can't just do a checklist and say, "Okay, the military agency has certified NEPA compliance so we don't have to do any more."

Senator **Reid**. Ms. Swartz, let's assume that the lead agency, which is the Department of Defense in the instance that you gave, let's assume they do a full NEPA compliance and they submit it to the FAA for the "checklist," so to speak. It doesn't look right; that's the problem. If you have the agency who wants to use the land, namely the Department of Defense, or the airspace, whatever the case might be, saying, "We've complied," and the FAA has no independent review process, it doesn't look right to the public because of some of the past experiences we've had around this country. The purpose of NEPA is to make sure that environmental concerns have been met. One of the problems that people have when we say "environmental concerns," they immediately think of trees and birds and things of that nature, but NEPA is much deeper than that. Is that not right?

Ms. **Swartz**. That's absolutely correct.

Senator **Reid**. In your opinion, has the FAA fully cooperated with CEQ in all the CEQ recommendations concerning lead agency responsibility for NEPA compliance?

Ms. **Swartz**. As I'm sure you're aware, we've had a lot of correspondence going back and forth between CEQ and the FAA. I think the last letter went from Chairman Hill to the Administrator of the FAA saying that although at this point we weren't asking them to change their regulations, we did not think that simply verifying NEPA compliance by another agency was sufficient under NEPA, and that I would be getting in touch with the FAA staff to talk about this and that perhaps regulatory change was going to be required. I haven't done anything since then; the letter is a couple weeks old.

Senator **Reid**. Mr. Chairman, does the committee have those letters that have gone back and forth between the agencies?

Ms. **Swartz**. I attached those letters to my testimony.

Senator **Reid**. Thank you very much.

Senator **Baucus**. Yes, we have those letters.

Senator **Reid**. Mr. Sanderson, what kind of NEPA procedures does FAA take responsibility for to ensure that minimum harm occurs to the environment with the creation or the expansion of a military training route?

Mr. **Sanderson**. One of FAA's principal missions, obviously, is aviation safety, as well as the environmental issues. EPA can't really speak to FAA's role in reconciling that mission of aviation safety with the protection of civil aviation interests with regard to the military airspace that you've talked about.

As with any other Federal agency, FAA certainly has the role that you discussed on protecting the environment. Our review of the environmental impact statements prepared by the military suggests that there have not been significant environmental interests at stake in military airspace use and expansion. We are not aware of what role, if any, FAA has had in reviewing the EIS's prepared by the military, but based upon our reviews we do not believe that the FAA's participation or lack of participation from our reviews has had any adverse effects on the environment. We just don't have the data to each any firm conclusions, although, we have seen what has been prepared.

Senator REID. What you're saying is that you don't know from the information you have? Is that right?

Mr. SANDERSON. That's correct. But I think we go back to your question on which Agency should be the lead agency, whether the FAA or the military. I think that needs to be decided by the two agencies involved under the requirements of NEPA and, as Ms. Swartz said, under the CEQ regulations and arbitrated by the CEQ if necessary. If in fact this is a major issue between the two agencies, I think the procedures are there, to work it out with the Council.

Senator REID. Mr. Ryan, I'd like to ask the same question to you. What kind of NEPA procedures does the FAA take responsibility for to ensure that minimum harm occurs to the environment with the creation or expansion of, for example, an MTR?

Mr. RYAN. Well, under the current procedures with regards to Special Use Airspace as we understood them over the past several years—and in fact had submitted, if not all of the handbook, part of our handbook dealing with environmental procedures to CEQ for review—we thought we had a green light on those procedures but apparently they are certainly in question now. But under the current procedures and those in the past, we had required the proponent, which in almost all these cases having to do with Special Use Airspace is the Department of Defense, to do an environmental assessment if there was supersonic flight irrespective of altitude, or if there was flight below 3,000 feet above ground level.

Now, we take the environmental assessment and we certainly review it; and if it calls for an EIS, we certainly review that. But I would have to say, without saying yes or no, that under our understanding of our responsibilities, it's the proponents' job to prepare the EIS.

You made an interesting point before when you mentioned that since DOD prepares it, it might be more favorable. But all proponents prepare their own, so I don't think DOD is any exception in this particular case.

Senator REID. Okay.

Mr. Ryan, would you give us an indication of how many requests by the military for Special Use Airspace have been turned down in the past couple of years?

Mr. RYAN. I was trying to get that figure, but I can give you one that will tell you—if I can find it here—that there's been an increase in the amount of airspace with regard to MOA's, Military Operating Areas, which are similar to the Hart MOA which you mentioned, and about a 1,500 square mile reduction in restricted airspace. Certainly, not an even tradeoff.

Here they are. MOA's in 1986, 16,400 square mile increase; in restricted area, 1,836 square mile decrease. Part of that, I think, had to do with Fallon that you mentioned because we had done a Special Use Airspace review of Fallon twice over the past several years and had noticed some areas we believe that ought to be turned back to the general public, and in fact have done so by establishing a corridor for general aviation airplanes to transit the Fallon airspace.

Senator REID. Mr. Ryan, you can understand the concern that people have and why we get letters and telephone calls. Looking at this map it's obvious that it's not just a complaint from the so-called environmentalists. This is one issue where there's broad agreement from private industry and environmentalists that something needs to be done.

Has the FAA sponsored public hearings during the past 3 or 4 years on these Special Use Airspace permits?

Mr. RYAN. Yes, sir. In fact, the one that you mentioned—you said your family attended one—we had two meetings with regard to the Hart MOA, one in Nevada and one in Oregon. The term is "informal airspace meetings." Ordinarily—they do follow a kind of a similar format—the FAA would present the airspace action that it is proposing, and in this case that's nonrulemaking action as a MOA. Then the Department of Defense proponent would tell the public at the meeting what it intends to do with the airspace and why it needs to do it and why it can't do it somewhere else and what the alternatives might be, kind of presents its case, then——

Senator REID. Are there transcripts of those hearings?

Mr. RYAN. No, sir.

Senator REID. Why is that?

Mr. RYAN. Well, it's not required. We do make a summary of the meeting. I even have more captured here than some of the respondents had at the meeting with regard to their concerns about already-existing MTR's and the ability to do wildlife refuge surveys and that type of thing.

But understanding that the Hart MOA starts at 11,000 feet and goes up to—but not including—18,000 feet, and is in fact 3,000 or more feet above ground level, it seems to me that it obviously leaves access underneath to get to some of these places for those folks that were concerned about that.

Senator REID. But isn't it more than just access to get someplace? Why the arbitrarily-established 3,000 feet and non-supersonic? People are more concerned—certainly you can drive under it; we all recognize that, but there are other things that people would like to do. We've had many complaints from ranchers and lots of people, and I've mentioned some of them in my opening statement.

What's magic about the 3,000 feet?

Mr. RYAN. I don't know the genesis of 3,000 feet, but understanding that if you consider that any airplane in compliance with the Federal Air Regulations could fly at 1,000 feet above a populated area, or out in a non-populous area as long as he was 500 feet from any building or person, he could go much lower than 3,000 feet on an individual basis and still comply with the Federal Air Regulations.

Senator REID. Mr. Ryan, you heard the figures that I went over in my opening statement on how much it has increased, not only in numbers of space but in actual area, a significant increase. It hasn't been slowing down. Now, if I heard your testimony correctly, the main complaint I heard from you is that the FAA doesn't have a big enough staff to do some of the things that should be done. Is that what I heard you say?

Mr. RYAN. No, that wasn't the main one. That was one of them.

Senator REID. You felt that things you do would duplicate what others do, maybe? Didn't you say that?

Mr. RYAN. Well, I think first of all, the bill says—as I recall it—if I have an approved MOA today and it was approved for airplanes that fly 400 miles an hour, if I now take an airplane in there that flies 500 miles an hour I have to go through the Administrative Procedures Act. That means I have to publish it in the Federal Register. It also means I now have to do an EIS based on the fact that the airplane has increased its speed—and I used 100—I just think the bill goes too far and is too all-encompassing.

I might mention one point that I'm not sure everyone is aware of. Military Operating Areas like the Hart MOA—if they're in between Federal airways, which I believe they are, but take any Military Operating Area—if the military decides to go out with four F-15's and is not in a control zone and is not operating on a Federal airway and decides to do it in consonance with other Federal Air Regulations, which means they remain VFR and they do everything else, they can operate out there today without any permission as long as they're in consonance with the FAR's. Many years ago, we tried to contain that activity in certain places so that we could give general aviation VFR pilots information about air combat maneuvers and acrobatics and that type of thing that we thought those folks ought to know about. And in addition, keeping IFR airplanes—we're talking generally about air carrier type aircraft—and taking them around it is what we've done over the past 15 years or so.

Senator REID. But, Mr. Ryan, you've helped paint the problem. Not only do we have the military within these areas; they can go outside these areas, and legally so. I understand that. So not only do we have these black areas on the map, it's compounded by the one example you've given, and there are others.

Would the FAA agree that there has to be some stop to this or slowing this down? And if so, what is your suggestion as to how we're going to slow it down?

Mr. RYAN. Well, I think that naturally, if we can expect a three to four percent increase in traffic every year, which is what we've been experiencing——

Senator REID. Commercial, you're talking about? Or military?

Mr. RYAN. Generally speaking mostly commercial, but somewhere in the neighborhood of 250,000 landings and takeoffs at our 22 busiest airports over the past fiscal year with the decrease in air traffic delays—I think there's a point of diminishing return. We cannot continue to take away a vital asset such as airspace, convert it to restricted areas or to MOA's or to ATC-assigned airspace, which is not an SUA but it's 24,000 feet and above. It's becoming increasingly difficult to do that. We recognize our responsibility in that area. We have increasing discussions with the military, with the Department of Defense who want, on some occasions, to increase that kind of airspace. I have to tell you that sometimes the increase in airspace may be in altitude and not necessarily in square miles.

We continually seek more innovative and unique and clever ways to accomplish their mission without increasing the airspace. We are most, most sensitive to that.

Senator REID. I appreciate the sensitivity, but the black areas keep growing on the map. That's the purpose of the bill that I've introduced, to try to slow this down in some way.

Mr. RYAN. May I make a point, Senator?

Senator REID. Sure.

Mr. RYAN. I think the biggest increase, if I've got my numbers correct, is in those areas off the East and West Coasts which are warning areas, which are over international waters and which are Special Use Airspace. But indeed, certainly there isn't a lot of demand out there, but the sheer numbers that you show of 270,000 square miles—I think a lot of it has to do with those areas off the East and West Coasts that don't lie over the contiguous United States.

Senator REID. But, Mr. Ryan, there's going to be testimony today about how States along the coasts do have problems, and they do have concerns about these warning areas. So hang around; you'll hear them.

Senator BAUCUS. Thank you, Senator.

Mr. Ryan, did I hear you say that the airspace is becoming saturated? You talked about the increase in commercial flights, and also about being creative and clever in figuring out how to accommodate these requests. The question popped in my mind, is it the view of FAA that we're running out of airspace?

Mr. RYAN. No. I didn't say "saturated," but I think we're concerned that we do have a diminishing resource. In fact, I might tell you that there are several initiatives underway—and we've accomplished a few of them in the past, one of them being Fallon and one of them being the restricted area over Patuxent River, R-4001, that we went into negotiation with the Department of the Navy on and established an airway through what used to be Patuxent River. Restricted airspace. It's shown big benefits in our expanded East Coast plan, of which Phase II went in this past Thursday, November 19th.

Right now there are some initiatives in increasing the capability of arrival/departure routes in the western United States, and we're talking with the military right now about how we might better utilize existing restricting areas and Military Operating Areas that they're using.

Senator BAUCUS. Well, we can't go into that in this area. The question just came to mind.

As I understand Senator Reid's bill, he would like the FAA and the Department of Defense basically to issue an EIS whenever there is a request for a change in airspace. As I hear you, the FAA has taken a significant position in another direction, which is the minimal use of EIS's.

I'm asking what the FAA's view is of a compromise middle position, namely, general compliance with NEPA; that is, for minor changes, an environmental assessment, and for major changes in airspace, an EIS?

Mr. RYAN. Well, certainly, I take no issue with doing what's required now. I think there's a difference of opinion, and certainly I think we may need to abide by what CEQ says. I think we need to have some further discussion on what the word—and unfortunately, I haven't been privy to the other meetings, but there's a word in one of their letters that talks about how we process the EIS or EA from the military, and then rather than read it and say that it's okay, we need to "verify" it. And I'm not sure what "verify" means. If it means doing another one, I'm not sure I want to do that.

Senator BAUCUS. Well, apart from all the bureaucracy and red tape and so forth, I'm sure you fully realize that there are a lot of people in this country that are just outraged by what they perceive to be too many military overflights, in some parts of the country. I would just tell you that I received many, many complaints over quite a long time from lots of farmers and ranchers in eastern Montana. That has subsided, but there was a time—and my sense is that it was much too long a period of time—when there were too many complaints. It seems like a lot of that could have been avoided earlier; that is, with either greater notification or with a little more advanced planning or more hearings or something, just to get a little better understanding of the Department of Defense's needs as they see them, and the needs of farmers and ranchers and other folks.

I think that the FAA has to go further, and significantly further, in helping to accommodate those problems. I encourage you to do so.

Mr. Schopf, I have a question on the Clean Water Act and how your agency is interpreting it. As you well know, many States are very upset with FERC's changes. Not too many years ago States believed the year would not begin until, in their view, they had enough information to begin to determine whether or not the application should be permitted or not. Then a couple of years later FERC comes by and changes that summarily, in the view of many States, and says no, it's just the date when the application is first received.

There's a second very strong complaint that FERC's change was made retroactive.

What's your view of that, particularly in view of the clear intent of the act that the States have a very definite—in fact, a primary—role in determining whether or not these permits or applications should be either denied or approved? It just seems to me that they've got a complaint, particularly when the retroactive portion was very deep in the explanatory statement, therefore making it very difficult for the States to receive adequate notice of the retroactive component of the change. Why isn't the first interpretation correct? What's wrong with that? It seems to me that unless the agency has very strong evidence of dalliance, of delays, of obfuscation and so forth which makes it difficult for FERC to comply, that their earlier interpretation made much more sense because of the law's intent to give primary responsibility to the States.

Mr. SCHOPF. Well, I think that in dealing with this issue, the Commission was faced with trying to implement two congressional objectives. One which you've mentioned is to allow the States to exercise their primary authority to certify that projects meet the Clean Water Act.

The other, however, which is also a congressional objective, is to make sure that the States act within a deadline established by Congress.

Senator BAUCUS. We don't have a lot of time here. On that point could you indicate the degree to which States have not been complying through the years, and how long, as dates? And also identifying the States? What evidence is there that there's been so much dalliance that should be changed?

Mr. SCHOPF. Well, we have some numbers. The problem with the earlier interpretation was that States read it—there was such a wide variety of interpretation by the States, so wide that it became impossible to determine when the clock started running on this deadline. We have numbers that indicate—in the actions where there had not yet been any State certification, and where certification was deemed waived by Order 464, the average amount of time these certification requests have been before the States is 36 months. That was really the problem the Commission had to deal with.

The Commission also started with the notion that it made sense to make sure that the States had some basic information before they were required to do their certification. The problem was, the way States interpreted that—some States interpreted that to mean they didn't have to do anything until they had completed their entire environmental review, that the clock wouldn't even start running until then. So as a result, what happened was that the Commission was faced with a situation where that earlier interpretation was essentially reading the statutory deadline out of the act entirely, which was why it moved to the second or latter interpretation.

And I guess it was really for the same reason that when the Commission did move to the new interpretation, it made it applicable to pending applications because—I guess the Commission felt that the status quo meant not enforcing the Congressional deadline at all.

Senator BAUCUS. Isn't it true, though, that most States don't have sufficient information on the date of receipt of the permit request or application? Isn't that true?

Mr. SCHOPF. Let me ask Mr. Springer here to comment on that.

Senator BAUCUS. I understand FERC's point of view. If some States delay for 36 months, that raises a concern. I understand that. It also seems equally clear to me, in fact more clear, that it usually takes a little time for the State to get all the information it needs to make a decision. I'm sure FERC sometimes asks for additional information.

Mr. SPRINGER. Mr. Chairman, the Commission's regulations require full consultation and for prospective applicants to conduct whatever studies resource agencies require of them before they file applications for a license. One of the resource agencies that the applicants are required to consult with are the water quality agencies of all the States. This process generally, in our experience, takes two to three years before an applicant may even file a license application.

So from the information we have, we expect the applicant to—and in most cases they have—consult with the water quality agencies in each State long before they file an application for license, and in most instances those agencies are expected to inform the prospective license applicant of what other kind of information is necessary to help the State make their water quality decisions. So at the time the license application has been filed, we expect that there has been a significant amount of study and research into the water quality problems and needs so that when the State agency receives their water quality certification request, we would anticipate that there would be a sufficient amount—or in most cases, a generally sufficient—amount of information.

Senator BAUCUS. I appreciate that.

We don't have a lot of time here. I'm frankly more disturbed about the retroactive application of this. It just seems to me that usually a retroactive application is undesirable, and that almost always when a change is made it should be prospective. I know the old theory in the law, but frankly that's an old theory in the law; I don't think it's very fair in a lot of cases. I just strongly believe that any change should not be retroactive but it should be prospective in all fairness to all the parties.

Senator Reid.

Senator REID. Nothing further, Mr. Chairman.

Senator BAUCUS. Thank you all very much. I apologize for the length of this session, but there is a lot of territory we have to cover. Thank you.

The next panel includes Mr. Rich Bechtel, Office of Governor Schwinden, State of Montana; Gail Greely, Henwood Energy Services, Sacramento, California; Langdon Marsh, New York Department of Environmental Conservation, Albany, New York; and Tony Willardson, Western States Water Council, Salt Lake City, Utah. And finally, David Conrad with Friends of the Earth, Washington, D.C.

Thank you all very much for coming here. Rich, we'll start with you.

STATEMENT OF RICH BECHTEL, OFFICE OF GOVERNOR SCHWINDEN, STATE OF MONTANA, WASHINGTON OFFICE

Mr. BECHTEL. Senator, thank you for the opportunity to testify on behalf of the State of Montana.

The State of Montana supports S. 1792 and the concepts embodied in the bill. We have always been troubled with the failure of the Federal Energy Regulatory Commission to adopt the Council on Environmental Quality's regulations implementing the National Environmental Policy Act. We support the proposal to require FERC to comply with NEPA as other Federal agencies do. We also support reversing FERC's administrative decision to retroactively apply a rule on 401 certification under the Clean Water Act.

Regarding NEPA, the State has found NEPA to be an excellent statute. It directs Federal agencies to be mindful of the environment in all of their projects. It calls on civil servants to exercise higher administrative skills of cooperation, communication and consultation.

As you know—you probably participated in the drafting of the Montana environmental policy act—we have a parallel statute to

NEPA. With those two statutes working, Montana agencies regularly do cooperative EIS's with the Forest Service, BLM, the Western Area Power Authority and the Bonneville Power Authority. As an example, WAPA recently built a transmission line from Great Falls to Conrad. Almost immediately the Department of Natural Resources and WAPA's consultants cooperatively developed an EIS and held joint hearings. As a result, the State used the Federal EIS for its own.

According to our statutes this process can take up to 30 months. Working cooperatively, it took less than a year and cost $40,000 instead of a possible fee of $215,000, so NEPA can produce considerable savings in time and money and a better product.

The process has been so successful in our State that Federal agencies have now formally recognized the cooperation in memorandums of understanding.

While our relationship with FERC has improved over the past year, the contrast between it and other Federal agencies cannot be more stark. First of all, FERC grants its hydro applicants preliminary permits which allow them to prepare for construction. As NEPA has proved, this is the most important time for cooperation in preparing the EIS, and yet FERC relies on the applicants to notify the State that they are proceeding and allows the State to participate only through intervention. This requires the State to duplicate nearly the entire series of environmental studies and hearings. This process requires the State and FERC to interact in a legal proceeding instead of gathering around a table to try to figure out what the problems are and to understand each other's point of view.

We see S. 1792 requiring FERC to work with the States in a more cooperative manner as set out in section 1506.2 of the NEPA rules.

Moving to 401 certification, the new procedure of starting the clock on the one-year deadline for 401 certification on first notification makes very little sense to us. We fully support and appreciate S. 1792's removal of the retroactive application of this change in the definition of the review period. On first notice, the State often receives little more than the name of the applicant and the location of the site, just the opposite of what we were just told; or at least, they don't meet the expectations expressed by FERC. For some time it may be undefined and the State can't advise on the impacts on water quality without knowing the dimensions of the project. As an example, it took the Montana Power Company a year or more after first notification to determine four alternative approaches it might take in reconstructing the Milltown Dam. It was working in a very responsible manner with EPA and the Superfund officials and all of our fisheries agencies. However, if water quality is a concern, certification should not be waived because a year has elapsed since the project was announced.

Senator, we would suggest that the committee amend the statute to restore the pre-February practice of not starting the review period until the project has been defined. We may be able to live with the change in the future, but water quality is not served.

All Federal agencies must comply with 401 certification and only FERC has expressed a problem with the review period.

The projects can range in size and complexity from the Forest Service building a bridge to siting to a ski lodge up on a mountain, an enormous mining operation, or a hydro project. As a result, some flexibility and discretion should be given to the States. The States are not arbitrary and capricious in determining when an application is complete. We follow regulations and rules issued under the Administrative Procedures Act, which is much like the process that the Federal Government follows. It is a process in which those who are affected by the procedures are able to comment and help shape them.

Montana is now beginning to revise its 401 regulations to ensure that its responsibilities are fulfilled, setting out the time period an applicant has to submit a complete application and the time the State has to respond whether or not it is in fact a complete application.

One further problem arises out of FERC's Rule 464. What happens when a State decision is appealed? This often happens. An upstream user or a third party may file an appeal. As an example, Tiber Dam had three groups apply for a permit to build the hydro project and ask for 401 certification. The Department certified all three; two appealed the certification to the Board of Health. The Board recertified all three, and a third party appealed to the District Court in Helena. The process began in 1980, they were certified in 1984, and are still before the District Court

In appeals, a State should be allowed a period of time after the settlement to incorporate any changes the appeals process makes to the project. As it is now, any party which would like to escape 401 certification can simply appeal a decision and run the clock beyond the one-year period.

Thank you.

Senator **Baucus**. Thank you very much, Mr. Bechtel.

Next, Gail Greely.

STATEMENT OF GAIL GREELY, HENWOOD ENERGY SERVICES, INC., SACRAMENTO, CA, REPRESENTING THE NATIONAL HYDROPOWER ASSOCIATION

Ms. **Greely**. Thank you very much. Thank you for this opportunity to come here today and speak to you.

I am here on behalf of the National Hydropower Association, which is a nonprofit organization founded in 1983 as a national voice for the hydropower industry. Its members include hydroelectric developers, owners and operators, manufacturers, engineers, utilities, as well as the legal, financial and consulting service organizations that support this industry.

NHA has over the past few years been particularly interested in the increasing burden of Government regulation that its industry is facing, and it is this concern that brings us here today, particularly to address S. 1792 and with a particular focus on Section 104 regarding 401 water quality certification.

As you, Mr. Chairman, recently mentioned, the question of retroactivity of the FERC's definition of when the water quality certification time limit begins is really a question of fairness. In summarizing the testimony that we have already provided to this committee, we want to stress the issue of fairness. In our view the application of this rule to pending projects was entirely fair to the States; it was fair to the environment, and to do otherwise would have been grossly unfair to the project applicants and to the system of hydroelectric regulation in general.

Remember that the FERC first started its rulemaking proceeding only 11 months after the Washington County decision was made, and at that time gave notice to these agencies that it had significant concern about intentional or unintentional delay in the process of certification. The members of NHA have experienced this themselves very directly and have had experiences of delay caused by confusion as to when the clock started and, in some cases, intentional delay that was designed to broaden the scope of the inquiry into the project.

When we look at how fair this rule was to the States we have to wonder whether they had sufficient notice that the rule might be changed, and they certainly did. The Washington County policy was in effect for less than 1 year when the NOPR was issued. There was a full notice of a proposed rule and opportunity for public comment, of which many States took advantage. There were 29 commenters on that particular rulemaking. There was also an opportunity to seek rehearing once the final rule was issued, and the rulemaking itself was pending for 18 months during which time these agencies were on notice that their freedom to continue to delay water quality certification could come to an end. They could have acted during that period. They also could have acted after the rulemaking was finally issued because FERC specifically provided an additional time for comment.

Remember that for all of these projects the States have already had one full year at least. And as Mr. Schopf and Mr. Springer earlier mentioned, the average was more like 36 months. They also had an extensive FERC pre-filing consultation period that extends, in my experience, for two to three years before the actual filing of the request for certification. During that time these agencies have the opportunity to work closely with the applicant. If they don't do so, the agencies can complain to the FERC and allege that the applicant is violating the conditions of its preliminary permit.

Given that they had ample opportunity to raise substantive water quality issues during this time period, we feel that application of the rule to pending applications was fair. It was also fair to the environment because water quality did not suffer as a result of waiver. The failure of the States to provide certification or the waiver of certification doesn't mean that water quality will not be addressed. The FERC for years has been requiring extensive water quality data in its applications. It has addressed water quality in its environmental assessments and environmental impact reports. In fact, in one project where the certificate was technically waived, in the Brassua project in Maine, the State provided comments in the period after the rulemaking and those comments were all accepted and used by the FERC in its final order on that project.

These State agencies simply need to inform the FERC of what their water quality concerns are.

Not to apply this rule retroactively or not to apply it to all these projects pending for so many months would be grossly unfair to those applicants. It has now been well over a year for all of them. It has been over 5 years for some of them, and these applicants are as entitled as State agencies to prompt action on their requests and prompt action on their license applications. They are not getting it, and they relied as well on the Clean Water Act to put some limitation on any abuses in issuing water quality certification.

More importantly than that, the delay of an additional year for these projects is damaging and unfair to the system of hydroelectric regulation, first because it creates an automatic backlog in an agency that is already facing a tremendous number of pending cases. Second, it undermines the Congressional intent of the Clean Water Act, which was to move expeditiously on the limited matter of determining conformance to water quality standards.

But beyond that, and most importantly in our view, the real issue is one of the scope of water quality certification itself. It appears to us that if States are having difficulty meeting this one-year limitation it is because they have broadened the scope of the water quality certification to include, according to letters from our membership, recreation, dam safety, fishery habitat, aesthetics and endangered species. They combine the broadened scope with the mandatory nature of the 401 certificate and usurp the authority of the FERC to do what Congress said in the Electric Consumers Protection Act is its mandate, to develop a comprehensive plan for improving or developing the waterway.

Hydropower is this Nation's best source of renewable energy, but the hydropower industry——

Senator **BAUCUS**. I'm going to have to ask you to summarize as best you can.

Ms. **GREELY**. I'm right at the end. Thank you very much.

But the industry is being hampered by an increasingly lengthy and costly administrative process that is not achieving anything more for the environment.

The Electric Consumers Protection Act tried to define the roles of the States and the Federal Government in the hydroelectric permitting process. We believe it should be given a chance to do that.

We would also like to ask that the record in this proceeding be kept open so that we can provide additional documentation from our membership on exactly how 401 is being administered in the States.[2]

Thank you.

Senator **BAUCUS**. Thank you very much. The record, for the interest of all those concerned, will be kept open for two weeks.

Mr. Marsh?

STATEMENT OF LANGDON MARSH, EXECUTIVE DEPUTY COMMISSIONER, NEW YORK DEPARTMENT OF ENVIRONMENTAL CONSERVATION, ALBANY, NY, ACCOMPANIED BY KEITH SILLIMAN, ASSISTANT COUNSEL FOR ENERGY, NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION

Mr. **MARSH**. Thank you, Mr. Chairman. Good morning. I'm Langdon Marsh and I'm the Executive Deputy Commissioner for the

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[2] The additional material referred to has been received and is retained in committee files.

New York State Department of Environmental Conservation. With me is Keith Silliman, Assistant Counsel for Energy for the Department.

I would like to thank you for this opportunity to testify on S. 1792. My testimony will focus on section 104 of the bill regarding the issuance of water quality certificates pursuant to section 401.

The Department strongly supports this section of your bill and generally supports the entire measure. The State Department of Environmental Conservation commented on the proposed rule by FERC, as did 28 other State agencies, citizen groups and utilities. We have submitted a copy of these comments to the committee.[3] On February 11, 1987, FERC issued Order 464 under which it reinterpreted the commencement of the waiver period to occur on the date of receipt of the certification request. This change became effective May 11, 1987 for all hydroelectric applications filed after the effective date.

With respect to the prospective application of this change, the feasibility of the reinterpretation of the commencement of the one year period will depend solely upon project applicants. The burden will be on them to ensure that adequate information to assess water quality and associated environmental impacts will be provided to the Department prior to filing for water quality certification. If adequate information has not been provided or is not forthcoming early in the one-year review period, the application will have to be denied without prejudice.

Although we're not happy with FERC's action as it applies prospectively, the Department can still meet its obligation under the Clean Water Act if applicants are forthcoming with the required information. With respect to the retroactive application of that rule, however, which was buried in the discussion section of the final rulemaking under "miscellaneous matters," we certainly have strong objection.

In April of 1987 the Department was notified by FERC that 23 projects in New York were affected by the retroactive application of Order 464. In reviewing our files we determined that water quality certificates had already been issued with conditions for four of the listed projects. In addition, we determined that certification had been denied for three of the listed projects. Upon raising these cases with FERC, we learned that FERC was interpreting Order 464 to apply to all hydro power projects, including those where certification had been denied or issued prior to the effective date of the order but where the State had not acted within 1 year of receipt of the water quality certification request.

Thus, three projects which had essentially been precluded from development based on their negative impact on water quality suddenly became viable projects. Another four projects which had been approved but with substantial conditions were now permitted to proceed without complying with the substantive requirements imposed by the Department. Not only had FERC precluded the Department from issuing water quality certificates for projects where the certificates had been pending for more than 1 year, it had arbitrarily voided actions taken by the Department regarding those seven projects that had been consistent with the articulated FERC interpretation in effect at the time that the Department acted on those prior requests.

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[3] Retained in committee files.

This abrogation of the State's authority to issue water quality certificates cannot be tolerated. The Department devotes considerable time, energy and resources to reviewing hydropower projects. The application for a water certificate triggers the implementation of a comprehensive environmental review under the State's Environmental Quality Review Act. It is possible that the Department would require the preparation of an environmental impact statement and have a public hearing under the State equivalent of the National Environmental Policy Act. The use of this comprehensive State environmental review has become more popular in recent years, both with developers and with public interest groups. By denying the State the right to issue water quality certificates for the pending projects, FERC is also eliminating the State's right to undertake this comprehensive environmental review.

We challenged FERC's action in a number of forums, both administrative and judicial, and we expect to win those if we prosecute them to conclusion. We think that what FERC did is not legally justified and we intend to pursue this through the courts. However, the enactment of S. 1792, especially section 104, would eliminate the Department's need to institute further court proceedings and would render the current court proceedings moot.

Section 104 addresses the very issue that the Department has raised in the administrative and judicial context, that the retroactive nature of Order 464 represents an arbitrary abrogation of the State's authority that should in some manner be reversed. If enacted, Section 104 would provide the Department with an additional year within which to act upon the water quality certification requests for those 23 projects affected by the retroactivity of Order 464, so we fully support this initiative and applaud your interest in addressing this important environmental protection measure.

In conclusion we would like to thank the committee for giving the Department the opportunity to address our concerns. We appreciate your efforts to correct what we feel is an unjust usurpation of State power under the Clean Water Act.

Thank you.

Senator BAUCUS. Thank you very much, Mr. Marsh.

We will next hear from Mr. Tony Willardson of Western States Water Council.

STATEMENT OF ANTHONY G. WILLARDSON, ASSOCIATE DIRECTOR, WESTERN STATES WATER COUNCIL, SALT LAKE CITY, UT

Mr. WILLARDSON. Thank you, Mr. Chairman. I am the Associate Director of the Western States Water Council. As you are aware, the Council represents 15 western States. The members are appointed by the Governor of each State.

We support Section 104 of S. 1792 as a necessary remedy. We see Order No. 464 as the latest symptom of the FERC malady that afflicts State water management agencies. It is an example of

FERC's continuing insensitivity to State concerns and is a significant obstacle to effective regulatory Federalism.

FERC itself, in noting the reassessment of its previous policies, stated that it was undertaken in light of the Commission's concern that under this practice States could delay indefinitely their acceptance of a certification request in contravention of the Congress' intent. We don't think that shows much faith in the States. We also feel that Congressional intent has always been that the States are primarily responsible for water quality management and the allocation of their water resources.

First, to highlight some of the problems caused by Order No. 464, the notice of proposed rulemaking in August, 1985 lacked notice of its retroactive application. Actually, the States were precluded from any voice in this issue when the final rule was issued on February 23rd of this year. It was not until some six weeks later, in April, that FERC provided the affected States with a list of those projects which they deemed to be waived. Once the States of California, and New York realized the effect of the rule, and petitioned for rehearing, they found that FERC had already determined that the 30-day period for rehearing had run and that they were precluded—as we heard, FERC has denied their petition for rehearing.

We feel that in essence FERC has usurped the States' water quality jurisdiction in this area and that Section 104 would be an appropriate remedy.

In surveying some of our States I came up with some examples that I'd like to cite to highlight some of the States' problems. One is in Oregon, the Grave Creek project. The project was certified by the State with conditions in March, some 30 to 40 days before the final FERC rule was made effective (May 11, 1987). FERC stated in their final rule that the States would be able to provide comments on any project which FERC deemed that the certification requirement had been waived, but in this instance, FERC licensed the project one day after an emergency request and without any of the State's water quality conditions. It is also interesting that the project does not have a State water right, and the emergency request for license was made just a few days after it was obvious that the State would deny the project a water right based on concerns for the steelhead and anadramous fish in that area.

The State of Oregon has stated that they do not accept FERC's authority "to ignore, circumvent and ride roughshod over the States in this area."

The Salt Caves project—again in Oregon—is an example where, as a result of Order 464, the State was required to deny a project certification in order to come within the new one-year period, even though the applicant had asked to reformulate the project. The State offered to reconsider and make a certification decision within 90 days of receiving the revised plans for the project. However, the City of Klamath Falls, the project's sponsor, appealed the decision to the Environmental Quality Commission in the State, and now counsel for the city maintains that, given the appeal, a final decision has not been made and the certification requirement is therefore waived under Order No. 464.

We, too, have some difficulty in documenting when a State has received a request for water quality certification. An example is the North Star hydro project in California. The State received a request for an application in December, 1985. In response to that request they sent the material for certification, but have yet to receive an application from the project sponsor. FERC moved to waive certification, and when the State challenged that action, FERC was unable to find that they had received any documentation of the certification request to the State.

Idaho has had similar experiences where they were unable to document receiving certification in some instances where FERC proposed waiving the requirement.

With respect to the problem of trying to evaluate projects in the conceptual stage, the Ten Sleep project in Wyoming requested Section 401 certification by the State when it had no Forest Service special use or surface occupancy permit and while the project sponsor was negotiating in-stream flows with the Wyoming Fish and Wildlife Commission. The State did certify the project, with specific conditions. FERC, again, has no record of the certification and listed Ten Sleep among the projects for which certification would be waived.

Lastly, I would like to bring to your attention, regarding FERC's general sensitivity to water rights and environmental concerns, the Rock Creek project in California. Here the project was given an initial State water right, but the State and FERC retained jurisdiction over bypass flows because of a lack of information from which to set permanent flows. Those initial flows were set at 11 to 15 cubic feet per second (cfs), but after further study the State Fish and Game recommended 30 to 60 cfs. After public hearings the State Water Resources Control Board adopted the higher flows. FERC, however, citing your (Senator Baucus') proposed amendments on State water rights to ECPA—citing those as background, FERC stated that they have complete jurisdiction and that the State Water Resources Control Board in California has no jurisdiction to set any in-stream flows which are contrary to the FERC permit. Again, I point out that they relied on the amendments which you proposed to ECPA, but never offered. FERC stated that since the amendments had been considered by Congress (a hearing was held after ECPA has passed the House and Senate), but not passed, that Congress showed it would defer to FERC's jurisdiction in this area.

Again, we support Section 104 and would urge the Senate to look further at the problems which the States are having with FERC.

Thank you.

Senator BAUCUS. Thank you, Mr. Willardson.

Our final panelist, Mr. David Conrad of Friends of the Earth. Mr. Conrad.

STATEMENT OF DAVID CONRAD, FRIENDS OF THE EARTH, WASHINGTON, DC

Mr. CONRAD. Thank you, Mr. Chairman. My name is David Conrad; I serve as a water resources specialist for Friends of the Earth here in Washington, D.C. As the others, I'll submit my written statement for the record and also add one additional piece for the record.

I would like to briefly speak in favor of all four sections of S. 1792. I think it's a good bill. I think it ought to be approved by the committee and ought to be approved by the Senate.

Regarding the one element of the bill that the CEQ representative spoke to, the reauthorization of the Office of Environmental Quality, I would echo that the CEQ and its Office of Environmental Quality provide very important functions in informing the President and the Nation about environmental problems, and involving itself in international environmental concerns. We would endorse the strengthened authorization level that is included over what has happened in the past couple of years and would recommend the reauthorization's passage because it is necessary to ensure the continuity of that agency, whose authorization has been on a year-to-year basis lately.

Second, the provision in section 102 of the bill provides a modest new program to have Federal agencies review detailed environmental statements, choosing random samples of some of those statements to determine the effectiveness of mitigation efforts recommended in environmental statements—and the extent that these recommendations have been put into place after the project gets built, and also the accuracy of environmental predictions. This is kind of the back end of the process that nobody ever looks at or is too seldom ever looked at, and I think that, although it's a modest program, this kind of review ought to apply to literally every project that an agency does. There ought to be some point later down the line when the agency stops and says, did we do what we said we were going to do? Shy of adopting something quite so involved, I think this program would be useful to at least suggest direction where things may be off track.

The other two issues have been addressed to some degree by our panel. We strongly support the clarification in Section 101 that the CEQ NEPA implementing regulations would apply to independent regulatory commissions. Generally, most Federal independent regulatory commissions have adopted the CEQ regulations; but, as has been said, the Federal Energy Regulatory Commission has not. This has been of continual serious concern to national environmental organizations because the Commission licenses hydroelectric power projects which certainly can have significant adverse effects. The Commission currently has a very short, undetailed set of NEPA implementing regulations. It does have a fair number of detailed regulations regarding what environmental information is required for applicants to present to the Commission in their license applications, but in terms of binding itself to certain procedures for handling NEPA, its procedures are far less detailed than the CEQ regulations.

In 1979, the Commission proposed some regulations to come more into compliance with the CEQ regulations, but those were never finalized. Now, nine years later, they have also proposed a new set of regulations, but those proposed regulations have deviated considerably from the CEQ regulations. They were heavily criticized by the CEQ, the EPA, the Department of Interior and environmental organizations.

The main point is that the Executive Orders and the CEQ regulations themselves are intended to provide a degree of uniformity in implementing NEPA for purposes of the courts, agencies and the public, and we'll just assert strongly that adopting the CEQ regulations would not restrict the independence of the FERC or other independent regulatory commissions. It provides an opportunity for the public to be involved in important cases and does not require them to be so specialized as to formally intervene on environmental or other grounds.

Senator BAUCUS. I would ask you to summarize, Mr. Conrad, as best you can.

Mr. CONRAD. Okay.

Finally, I will just indicate our strong support for section 104 of the bill. I don't believe that the States were fairly treated in the retroactive application of the waiver rule, and I would hope that the committee would approve section 104 and pass that on to the full Senate.

Senator BAUCUS. Thank you very much.

Let me ask all of you a basic question. I think it's fairly clear that the agency—in this case, the Federal Energy Regulatory Commission—is unfair and improper in the retroactive application of its second rule. I think there's not much disagreement over that; in fact, I sense that even FERC realizes that that's pushing matters a little bit.

Nevertheless, in trying to find a proper balance between State and Federal regulation here, it is clear that the act gives States primacy in determining whether or not to grant these applications. I think that's quite clear. On the other hand, it seems to me that perhaps FERC has a legitimate complaint; that is, it may be that the States are taking a long time. I think Ms. Greely alluded to the many months that it takes many States to pass on some of these applications.

So it seems that a basic question is, what constitutes a completed application? That is, when should a certain period of time begin. I personally believe that this world has to have deadlines and agencies have to have deadlines, or often not much happens. Maybe 1 year is too short; maybe it should be 2 years. I don't know, but I do think there should be a fairly specific time so that all parties know when a certain period of time begins to commence.

I'd like to ask each of you what you think should constitute a completed application so that the period of time, whatever it is, commences.

The second question I'd like you to address is, what do you think a reasonable time should be within which an agency should either grant or deny one of these permits so that FERC knows what to do about it?

Just very briefly. If you don't have any views on that subject, please pass in the interests of time, but I'd like to ask you to address those very, very briefly in just two or three sentences each.

Mr. Marsh. We'll go down the table here.

Mr. MARSH. Yes. Well, I think that the period within which it should start, the completion of the application, ought to be when there's sufficient information available——

Senator BAUCUS. When is that?

Mr. MARSH. That's usually when the consultation process has been completed and the applicant requests water quality certification. That should be sufficient——

Senator BAUCUS. And how long does that take, generally?

Mr. MARSH. Subsequent to that?

Senator BAUCUS. No, how much time generally transpires so that that consultation is complete?

Mr. MARSH. I don't personally know that.

Senator BAUCUS. Your best guess.

Mr. MARSH. I think that it takes up to two to three years sometimes for that pre-application process to occur.

Senator BAUCUS. OK. In your view, once that's a completed application, then how long should a State have?

Mr. MARSH. I believe a full one-year period is sufficient.

Senator BAUCUS. OK.

Ms. Greely.

Ms. GREELY. I would believe that the application is complete when it's filed and when the consultation period that's gone on before that has been completed between the States. I think that the time period after that could be shorter than one year, that a reasonable time of six months would be adequate, given that consultation has already been completed.

Senator BAUCUS. You think that the present practice of consultation is working up to that point?

Ms. GREELY. I think it is working when all the parties cooperate to make it work.

Senator BAUCUS. But it works well enough so that we in Congress shouldn't be concerned with addressing that?

Ms. GREELY. I don't think Congress need be concerned about the process working.

Senator BAUCUS. OK. Thank you.

Mr. Bechtel.

Mr. BECHTEL. Senator, we're redoing our rules to put a clearer deadline in as to when an application is complete because we often have applicants simply notifying the State that they intend to build, and there have been no pre-discussions such as FERC mentioned. As we mentioned in these Milltown cases, which has a Superfund behind it, the issues involved can be extremely difficult. Montana Power has just now determined its four options for reconstruction, and that's taken them about a year or more. At the same time, it is impossible for a State to certify a project until it has been defined.

These are very complex and they vary by project, but we could certainly live—after there has been some definition given as to what the project is, we could live with a one year deadline as well.

Senator BAUCUS. OK. Thank you.

Mr. Willardson.

Mr. WILLARDSON. I would just refer again to the difficulty in determining the criteria for what is a complete project application. As I understand it, a project applicant can ask for certification long before they've completed the consultation process with FERC. I can't speak for all the States, but those that I've talked to—most of them felt once they had the information they could make a decision easily within 90 days. So one year does not represent a problem once they have that information.

Among the State people that I've talked to, some suggest tying section 401 certification requests to something else, perhaps the filing for a FERC license following consultation. One State official admitted that they simply waive certification, knowing that they're going to get another crack at the project when they come in for a section 404 permit. At that point they usually have adequate information for the State to make a decision.

Senator BAUCUS. Thank you.

Mr. Conrad.

Mr. CONRAD. Supposedly, the consultation process is complete at the point at which a license application is filed and accepted for filing at the Commission.

I believe that States should probably have a full 1 year to act upon certification requests because the reviews are not precisely the same between water quality and what the Commission does. Although the Commission in licensing requires——

Senator BAUCUS. So between a year and what? Ninety days? Sixty days?

Mr. CONRAD. I'd like to add one thing, though. The Commission does not require State certification under section 401 of the Clean Water Act for exemptions, which these days—well, exemption projects can also have significant water quality effects. I think that that is another area where the Commission's process is flawed.

Senator BAUCUS. One final point. We've got to move on.

Mr. Bechtel.

Mr. BECHTEL. Senator, I wanted to amend my statement on one point. If a project or a certification has been appealed, there should be some kind of an extension of the deadline. Certification ought not be nullified or waived if it has been taken to court and the deadline elapses as a result.

Senator BAUCUS. That's a good point.

Thank you very much. We appreciate it.

Our final panel is Mr. Leo Penne, Office of Governor Bryan, State of Nevada; Dr. Lynn Muchmore, Department of Natural Resources and Community Development, State of North Carolina; Mr. Webster Todd, Aircraft Owners & Pilots Association, Washington, D.C.; and Laurens Silver, Sierra Club Legal Defense Fund, Washington, D.C.

Senator REID. Mr. Chairman, while the panel is being seated I'd like to say one thing to the representative of the Governor of Montana, on his way out. Is he still here? Mr. Bechtel?

We have so few people from the west that come and testify before our committee and this is my first experience in having a witness from Montana. I think the people of Montana should know the great work that Senator Baucus does for this country and the State of Montana in areas that deal with environment and public works and, of course, finance.

This is vacation week for most people, but this is an indication of your hard work. I think the people of the State of Montana should recognize that.

Senator BAUCUS. Thank you, Senator.

Our first witness is Mr. Leo Penne from the State of Nevada.

STATEMENT OF R. LEO PENNE, OFFICE OF GOVERNOR BRYAN, STATE OF NEVADA

Mr. PENNE. Mr. Chairman, Senator Reid, I am Leo Penne, Director of the State of Nevada's Washington office. I am pleased to appear before you today on behalf of Governor Richard Bryan of the State of Nevada to provide testimony on the Airspace Protection Act, S. 1584.

At the outset I want to convey to you the Governor's full support for this important legislation. We believe it is not only timely, but when enacted it will provide an opportunity for all interested parties to evaluate new airspace withdrawals and reclassifications proposed by the various branches of the military.

I should note that last year the Nevada Legislature passed a joint resolution urging the Congress to investigate the designation and control of military airspace. To reinforce a point made by Senator Reid in his opening statement, it is clear that the historical and widespread strong support for the Nation's national defense facilities and activities are compromised, at least to some degree, by the very widespread and strong concern amongst the citizens of Nevada about the airspace issue. This is reflected in the recent University of Nevada at Reno poll showing that 80 percent of those polled would support a decision that would involve the Congress in authorizing airspace removals.

Clearly, the bill will provide a forum for open public discussion and analysis of new airspace withdrawals. The legislation will allow the concerns of those most affected by changes in military airspace to be heard and considered. As you know, those most directly affected are the citizens that would be affected by military overflights. Others who may be affected include the aviation community and the ranching and mining industries.

In order to explain our strong support for this bill, we believe it is important to describe to the committee the scope and presence of Defense activities in the State of Nevada and to list some of the events that have changed military airspace in Nevada over the past decade.

Currently, Nevada hosts several major Defense complexes, including Nellis Air Force Base and Range; Fallon Naval Air Station; Hawthorne Ammunition Depot, and the Nevada Nuclear Test Site. In all, the Department of Defense and the Department of Energy control nearly four million acres of public land across the State.

In addition, during the past five years Nevadans have seen the creation of two separate military supersonic operation areas, one for the Air Force and one for the Navy. Together, these two areas overlie some 6,800 square miles of public and private lands. We've also seen the creation of a new low-level training route by the Strategic Air Command and a new Military Operations Area of 900 square miles for the Oregon Air National Guard.

Beyond these airspace withdrawals, the Department of Defense is currently planning new land withdrawals totalling some 270,000 acres. These actions encompass the Groom Range withdrawal by the Air Force and the Navy's expansion withdrawal of several air-to-ground bombing ranges.

What is significant about all of these airspace and land withdrawals is that each of them is undertaken separately and, for the most part, by different branches of the military. The piecemeal approach to Defense planning has resulted in the perception that military resources are being duplicated. The resulting cumulative effect of these actions has left nearly 40 percent of Nevada's airspace under military use and control.

The bill before you will mandate that all proposed acquisitions of airspace for military use be subject to the requirements under section 102(2)(C) of the National Environmental Policy Act. We believe the legislation is necessary for the following reasons.

First, all new Special Use Airspace actions will be subject to a cumulative effects analysis required under NEPA, providing the opportunity for local, State and regional analysis of new airspace withdrawals.

Secondly, under current Federal regulations, the Federal Aviation Administration can approve certain forms of military Special Use Airspace without complying with the provisions of the National Environmental Policy Act. The FAA now exempts proposals from environmental analysis for new airspace that would be 3,000 feet above ground level. We believe this arbitrary regulation fails to protect public health, wildlife, cultural resources, and unique recreational opportunities.

Thirdly, it has been our experience in Nevada that when the FAA authorizes an increase in Special Use Airspace, this increase is added to existing airspace without any provision for reviewing how the military is utilizing the present airspace.

Fourthly, we are concerned that the FAA has abdicated its responsibility concerning the creation of certain types of military use airspace. For example, the FAA has allowed the military to designate airspace resulting in dangerous joint military and civilian use.

Mr. Chairman, as I noted at the outset, this issue has been significant enough within the State that the Legislature in its last session passed a special joint resolution calling for action by the Congress. That resolution requests that the Congress enact legislation enhancing public participation in the process of establishing Special Use Airspace.

Nevada supports Senator Reid's bill because it mandates a new public review process as required under NEPA. This is particularly important in the west because military overflights are conducted over public lands, making it almost impossible to effectively question Federal decisions about these lands and the airspace.

Mr. Chairman, members of the committee, on behalf of Governor Bryan I would like to thank you for listening to our position on this piece of legislation.

Senator BAUCUS. Thank you, Mr. Penne.

Our next witness is Dr. Muchmore, Department of Natural Resources, State of North Carolina.

STATEMENT OF LYNN R. MUCHMORE, DEPARTMENT OF NATURAL RESOURCES AND COMMUNITY DEVELOPMENT, STATE OF NORTH CAROLINA

Mr. MUCHMORE. Mr. Chairman, eastern North Carolina officials have tiptoed through the 1970's and 1980's against a backdrop of intense conflict about the use of our natural resources. Convinced that our beaches, our estuarine waters, our scenic and historic attractions and similar seaside amenities should be available for human enjoyment and that access means roads, housing and commercial development, but knowing at the same time that the natural systems making up our coastal environment can be devastated by mindless growth, the Governor and our General Assembly have crafted law that subjects potentially damaging development to early public scrutiny and to careful evaluation by regulatory professionals.

The North Carolina Coastal Area Management Act and the State's Environmental Policy Act create a vital machinery that our citizens rely upon to assure that actions proposed by Government or the private sector are systematically examined in an open process to expose their full implications for the human environment. Debate about such proposals in North Carolina is not only accepted, it is expected. The years of vigorous dialogue have had a healthy effect upon State policy and have greatly refined the public's understanding of environmental consequences that run with human activity.

For the most part, this progress at the State level has been complemented by Federal agencies operating under the Coastal Zone Management Act and the National Environmental Policy Act. Remarkably, even the Army Corps of Engineers plays by the rules in our State, and we enjoy a good working relationship with that agency.

Thus the Federal Aviation Administration is a glaring exception. It simply excuses itself from the NEPA requirements that govern Special Use Airspace decisions. We believe it does so illegally, and Special Use Airspace decisions matter to the people of eastern North Carolina.

In the past three years we have watched five separate proposals for military airspace expansion go to the FAA from three Service branches—the Navy, the Air Force, and the Marine Corps. Together, they shadow a million acres of eastern North Carolina; affect four of the five fastest growing counties in the State, and directly impact Dare County, reputedly the fastest growing county in the Nation. They funnel high-speed fighter traffic at low altitudes down a pristine national seashore. They take away airspace used by the State for marine fisheries, wildlife, and forest management activities. They jeopardize the viability of needed civil aviation routes by mixing military and civilian traffic in airspace that lacks radar and communication services.

They further antagonize an already irate citizenry fed up with broken windows, cracked plaster, and treetop confrontations with "hot dog" pilots violating the military's own rules at near supersonic speeds, pilots who seem immune from disciplinary action unless some ordinary citizen who happens to have near supersonic eyeballs can get the number of the aircraft or discern what type it is and who it belongs to.

In not one of these five cases has the Federal Aviation Administration recognized its legal obligations under the National Environmental Policy Act. North Carolina has been left to deal as best it can with three Service branches separately, and in these dealings we frequently seem to be regarded as some threat to the national security, a characterization that is frankly infuriating because we are a State that is traditionally supportive of a strong defense and a State that accepts the need for training and readiness.

In the context of both the Federal and the State commitment to carefully evaluate the environmental impact of proposed governmental actions and to provide a specific example of our problem, let me cite a request from the Navy to enlarge the restricted area of Stumpy Point, an enlargement that we knew would provoke public protest. We asked for environmental documentation from the Navy. Our petition was brushed aside. It was only when our Attorney General invoked the Freedom of Information Act that we were finally given the Navy's environmental assessment. I have it here, all one and a half pages of it. It had never been circulated for administrative agency review. It had never been circulated for public review. It cavalierly dismissed the proposal as noncontroversial. It is pitifully inadequate, both procedurally and substantively, by any professional standard.

Who is accountable for such a response? We read NEPA regulations, and they indicate that the FAA is accountable. The Council on Environmental Quality in the Executive Office of the President interprets the NEPA regulations and says that the FAA is accountable. That should be enough, but we are driven to this absurd extreme to support a Senate bill that requires the Federal Aviation Administration to obey the law because somebody in that agency continues to play games with the English language.

We are slowly forcing the Service branches into a more conciliatory attitude. In fact, recently we have had some very productive discussions with the Navy. The Marine Corps has become more sensitive to NEPA requirements. But the problem in North Carolina, as in Nevada and other States, demands a recognition of cumulative impacts, and each Service branch pursues its own objectives with little knowledge of or concern about proposals being made by its peers.

The problem in North Carolina and in Nevada and in other States requires a comprehensive management plan for Special Use Airspace, taking at once military needs, the current use of some three million acres already dedicated to military air training, and the economic and environmental factors that are considered in virtually every other governmental decision with significant effects.

Senator BAUCUS. I'll have to ask you to summarize as best you can.

Mr. MUCHMORE. Let me summarize our position.

The time when North Carolina airspace could be regarded as a "free good" available without cost to the military has passed, overtaken by intense competition for natural resource uses.

The means to manage that competition are in place at the State level and at the Federal level. One of the most important is NEPA.

Practically speaking, the FAA has nullified NEPA for purposes of these decisions. We cannot compensate for their delinquency by continuing to negotiate with separate Service branches.

Unless and until FAA fully embraces NEPA and accepts NEPA responsibilities, citizens' demands will grow more shrill and States will be driven to the courts for remedies. We do not want to exercise that option. S. 1584 seems to be the only available recourse.

Thank you for your attention and for this opportunity to press our interests before the committee.

Senator **Baucus**. Thank you, Dr. Muchmore, for that excellent statement. It was one of the better ones.

Next, Mr. Webster Todd, who represents the Aircraft Owners and Pilots Association.

STATEMENT OF WEBSTER B. TODD, JR., AIRCRAFT OWNERS AND PILOTS ASSOCIATION, WASHINGTON, DC

Mr. **Todd**. Senator Baucus, Senator Reid, I would say that as a resident of Pray, Montana I am delighted to join my predecessor and therefore give you two Montana witnesses today.

On behalf of the Aircraft Owners and Pilots Association and our 260,000 members nationwide, I must say my fellow panelist from North Carolina expresses a feeling that we all have that it is indeed a shame that we need another piece of legislation to cause a Federal agency to discharge the provisions of statutes already in existence.

AOPA believes philosophically that the environment does not just include the normal listed issues of plants and animals and ecosystems and flora and fauna but also the total operating environment that exists above and around the ground impacts. The issue of Military Operating Areas and Special Use Airspace indeed is an area where the total environment must be considered, and therefore I think it is germane that this committee look at this issue in the form of the legislation that is before it.

We also believe very strongly that the FAA is in charge of the airspace in the United States of America. Nobody else is; they have that statutory authority. They can delegate, they can agree, they can sign letters of agreement or negotiate agreements with other entities on how that airspace is going to be used or controlled or protected or operated, but it is their primary responsibility to determine how that airspace is used and to whom it goes and on what basis. Therefore, I do not think—as was previously testified to— that the requirement that the FAA be the lead agency on the environmental impact statement relative to Special Use Airspace is a burden because it's a burden that they already have now and should discharge. They should recognize their need to discharge that.

The openness of the process, the FAA leadership, and the semiannual review are most important aspects of this legislation. The GAO report that was issued this spring, while making it very clear that there is a need for better internal, intra- and inter-Service coordination, indicated that there is also a need for better coordination amongst the other users of the airspace. Other public entities, whether they be the States, the airport communities or aviation interests or environmental groups must be brought into the deliberations early on. What the GAO did not point out and address was the cumulative process of this airspace designation and use that has gone on for the last 25 years. New SUA/MOA is added all the time with little consideration given to existing SUA/MOA airspace potential or continued, justified need.

AOPA also believes that the air and the ground are linked, that you cannot separate the airspace and the use of the airspace from the ground facilities and the use of the ground facilities. As Senator Baucus knows, if we did not have ex-military bases in Montana to operate from in a civilian fashion, we wouldn't have air service across the entire northeast tier of that State. That has occurred and exists only by good fortune. Around the country there are a number of military air bases today that are not used fully in accordance with their strategic and mission profiles that are dropping out of the aviation system because joint use is not permitted in a timely fashion. Because of a "stonewall" attitude on the part of the military that says, "This is national security. This is proficiency. We have to do it our way and if you don't like it, we'll just go someplace else," critical ground facilities are being lost because civilian use is not permitted

We think that the FAA needs to accept and exercise its responsibility. We think there is a need for semi-annual review. We certainly recognize the need for military proficiency, military use of space, but not in an uncoordinated and cumulative sense that serves to the detriment of all of us.

Thank you, sir.

Senator Baucus. Thank you, Mr. Todd.

Mr. Silver of the Sierra Club Legal Defense Fund.

STATEMENT OF LAURENS SILVER, ESQ., SIERRA CLUB LEGAL DEFENSE FUND, WASHINGTON, DC

Mr. Silver. Thank you for the invitation to testify.

I am here representing the Sierra Club. I am a lawyer who has been involved in several lawsuits that have involved the designation of airspace and use of airspace by the military.

There have been challenges to the designation by the Navy of the Supersonic Operations Area near Fallon, and there currently is a challenge to the designation of the Hart MOA pending in the Eastern District of California. In that case, I am representing Lake County, Oregon and Washoe County, Nevada, as well as the Sierra Club.

I think that it is most useful for the committee here to look at the precise process which took place with regard to the designation of the Hart MOA. That process is not unique; it is a paradigm, really, of what—at least according to my understanding—has taken place for some time.

The Hart MOA extends over 100 square miles of public and private lands in northeastern Nevada, southeastern Oregon and northeastern California, including two large wildlife refuges and eight wilderness study areas. The MOA as approved by FAA authorizes 3,500 military training exercises per year at high speeds during three days per week on the average, four to six hours per day. These missions will involve training low-altitude interceptors in air combat tactics and will have a maximum of 20 planes per sortie. They will take place between 7:30 and 4:30 p.m. The MOA will be available for military use seven days per week, four weeks per month, twelve months per year.

There has been talk this morning about the informal airspace meetings held at Lakeview, Oregon and Sparks, Nevada in late 1986 "to solicit additional aeronautical comments," and I think that's precisely the point about these so-called "informal airspace meetings" that were held by FAA. They were expressly limited to aeronautical comments and aeronautical concerns. To the extent that other concerns were made and expressed by citizens concerning environmental factors, disturbances to cattle, economic concerns, people were basically told at those meetings that "that's really the concern of the Air Force." There was testimony—of course, no transcript was taken—FAA made it clear at this point and in its subsequent decision documents, including the decision document authorizing approval of the Hart MOA, that environmental concerns were not within its jurisdiction at all.

As also indicated earlier, FAA prepared no environmental assessment, FONSI or EIS in connection with the proposal of the Air Force for designation of Special Use Airspace as the Hart MOA. It referred all agencies—and there were numerous agencies, including the Fish and Wildlife Service, Department of the Interior, Bureau of Land Management, who voiced concerns about the designation of the MOA—all of them were referred to the military agency, in this case the Air Force. However, the Air Force, even prior to the citizen meetings, had already made a determination that this activity was categorically exempt.

So the FAA, in effect, conducted no review of the determination of the Air Force that the environmental effects of the proposed Special Use Airspace action were so insignificant that they qualified for categorical exemption.

The FAA relied on an Air Force certification of NEPA compliance which was essentially one sentence on one piece of paper submitted by the Air Force to FAA saying, "We have complied with NEPA," and alluded to some environmental assessment which in fact was nonexistent. In fact, all the Air Force did was certify that it had found this to be categorically exempt.

So the FAA made no independent assessment of the environmental effects of the designation despite its exclusive authority to designate and control airspace. The FAA did not make its own evaluation of the environmental issues relating to the designation of Hart MOA as Special Use Airspace and did not take responsibility for the scope and content of any environmental assessment or the Air Force's determination, in this case, that no environmental assessment should be prepared. In that connection I think it's very significant that testimony from the FAA this morning indicated that, well, if there were an environmental assessment, it would be reviewed. That statement, I think, lacks candor in two respects. One is that there aren't environmental assessments normally prepared by the Air Force or any other military agency in connection with designation of Special Use Airspace because in most instances the military will consider it to be a categorically-exempt activity and there will be no environmental documentation unless supersonic activity is involved or air flights are proposed for less than 3,000 feet.

Secondly, the statement lacks candor in that if there is environmental documentation, there is no evidence within the framework of FAA's existing regulations that that environmental documentation would accompany the agency process through FAA consideration. In fact, at least in my experience, I think FAA would ignore such documentation and it would not accompany the agency proposal.

Given the policy of the FAA that compliance with NEPA is the responsibility of the proposer/user agency, I just wanted to close my testimony by saying basically that this is a typical FAA response to citizen concerns. It is manifested in the May 15th, 1987 letter of Robert Brown of Northwest Mountain Region of the FAA to me, attached as an exhibit to my testimony. Its two salient sentences: "Compliance with the provisions of the National Environmental Policy Act are the responsibility of the military service making the proposal. Therefore, comments relative to environmental concerns—noise, pollution, quality of life, etc.—were forwarded to the Director, Environmental Planning for the Tactical Air Command at Langley Air Force Base, Virginia." Now that's, of course, the same command that had already made a determination at the time these comments were ostensibly forwarded—if any were forwarded at all—that none would be considered because this was not an environmentally-significant action that required any environmental assessment at all.

So the public concerns for the quality of the environment below the proposed Hart MOA fell on deaf ears.

FAA is completely indifferent to the environmental concerns of citizens upset by the military use of civilian navigable airspace. Thank you.

Senator BAUCUS. Thank you very much, Mr. Silver.

I think it's clear that the FAA is derelict in its responsibility, basically washing its hands of a lot of these problems. I think there's not much doubt about that, and I also agree with Dr. Muchmore when you made the point that it's a travesty when there has to be a bill to tell the FAA to do what it should be doing. I agree with that.

I was going to ask you, pending any legislation, whether the State of North Carolina or any affected citizens of North Carolina had contemplated bringing a lawsuit against FAA and/or whatever Service branch is most relevant. Mr. Silver said he's been involved in some litigation. I'm just curious as to what—one would not want to resort to litigation unless you have to. It's cumbersome, expensive, and so forth, particularly in a case like this where it's fairly clear, at least in my view, what FAA's responsibilities are.

Could you give this committee some sense of the degree to which you have considered litigation?

Mr. MUCHMORE. We have actively considered litigation. We have the matter under discussion with our Attorney General's office, so there is some interdepartmental attention given to it. As I said in my testimony we would prefer not to do so. It is expensive, time-consuming, and so forth.

We have made progress, we think, in the last year and a half through aggressive action by our own aviation officials and our own Department and the Attorney General's office with some of the military. If we could make similar kinds of progress with the FAA, I think the temptation to litigate——

Senator BAUCUS. Do any of you know of any lawsuits pending that would address this question?

Mr. SILVER. The lawsuit pending in the Eastern District of California concerning the designation of the Hart MOA raises the question of whether or not the designating agency, FAA, complied with NEPA. So these issues are addressed in that lawsuit. One problem is that the FAA has raised a host of procedural problems, including a motion to dismiss, saying that the plaintiffs are in the wrong court which will certainly, I think, delay resolution of this. So I can't promise any swift resolution in the courts apart from the fact that even if the plaintiffs prevail they would likely be an appeal to the Court of Appeals by the FAA.

Senator BAUCUS. I might just add to that point from my experience. There is a Ninth Circuit Court of Appeals decision that held that the Army Corps of Engineers was not complying with NEPA. The State of Montana wanted to go ahead and construct a dam, and unfortunately we had a hard time dealing with the Army Corps of Engineers directly. Just passing legislation was a cumbersome way, to encourage the Corps to do what we felt the Corps should do. Various organizations filed a lawsuit and they were successful. The Ninth Circuit Court of Appeals held that the Army Corps of Engineers had not complied with the requirements of the law, and effectively they—through the lawsuit—were able to accomplish their results in forcing the Corps to comply.

I know that often litigation is a long-time thing; it's cumbersome, and too often the defendants—and the plaintiffs, too—file all kinds of dilatory motions, and it's a problem. I am hopeful that we can address this legislation, but in the meantime you may have to keep the pressure on, as apparently North Carolina is—at least informally, if not formally—to accomplish this result.

Senator Reid.

Senator REID. Thank you very much, Senator Baucus.

I would hope also that we can move this legislation. I had a number of questions that I was going to ask these witnesses. This is a fine panel; the staff should be commended for putting this group of people together because I really don't have any questions. I have a couple of comments based on the testimony given, but I think it was direct and to the point and it cries out for some legislative review.

When you get States like North Carolina and Nevada, States that have bent over backwards to help the military—and suddenly they're raising their hands and saying "we need some help"—you, Mr. Chairman, talked about litigation as a possible alternative. It's an alternative, but the resources of the States are so limited, when you have to take on the Federal Government in an area that's unnecessary—we're already doing battle with clean water and clean air and all kinds of other things, and it is just an unnecessary battle. It's an alternative. As an old trial lawyer, it's something that has to be reviewed; but it's an unnecessary expense for the States.

Dr. Muchmore, all the testimony was excellent but your statement was outstanding. I think it's too bad that Senator Sanford and Senator Helms couldn't be here to hear your testimony, and I would hope that through your offices you get them a copy of your testimony because it was really excellent. Some of the things you said, that we should consider human enjoyment—you said it much better than I did when the FAA representative was here. We need to consider human enjoyment separate and apart from some arbitrary ceiling figures that they've put on airspace. There should be a systematic examination.

The representative from the FAA here today complained about changing airspeed. Well, we know that that's "nitpicking," for lack of a better word. We're not concerned about changing airspeed. What we are concerned about is, once they get new airspace, do they still need all that other that they've had? So systematic examination is a good term of art.

You went through with deliberation how the State of North Carolina has worked with governmental agencies, and you've made some progress. We in Nevada can say the same thing. However, the FAA is a glaring exception. It really is. Especially, Mr. Chairman, you tie onto that the tremendous responsibility they have for making air traffic safe in this country—250,000 landings a day, I think he said.

Senator BAUCUS. That was only at the 20 busiest airports.

Senator REID. Yes. That's right.

When you consider that for every commercial airline that takes off, there are five—I think you said, Mr. Todd—noncommercial airlines that take off; for every airport that serves a commercial airline, I think there's an indication that there are six other airports that are in existence. So the FAA has a tremendous responsibility.

Fighter traffic over pristine areas--another term of art that I thought was important from your statement. And you also said that when they asked for new areas, they antagonize an already irate citizenry, and there couldn't be a better description of what's going on in Nevada.

I came up with this legislation, and there have been people in the military who have questioned my patriotism. How could you do this they say? They questioned my patriotism. That, of course, has only made me more determined to do something about a situation that cries out for help.

One last thing, Mr. Chairman. The panel is outstanding, but I would like to state one parochial thing to Mr. Penne.

When I served in the House of Representatives I addressed the State Legislature. One of the things that I said was important to the State of Nevada is to have a Washington office back here so that there will be a Nevada presence to work on some of the problems that come up all the time. We in Nevada had never had that.

Governor Bryan met that call and worked with the State Legislature and established a Washington office. The State Legislature should know that this is only one example of how this pays dividends. The State of Nevada hasn't had to pay to fly somebody back here, to put them up and all the other incidentals that go along with that. This is only one example of how you are saving the people of the State of Nevada money, and I compliment the Governor and the State Legislature for creating this office and making the State of Nevada more available to the congressional delegation.

So, Mr. Chairman, I again really appreciate your arranging this hearing, and I look forward to working with you to make the FAA more responsible to the needs of the people of this country.

Senator BAUCUS. Thank you, Senator. Actually, it's you who have really focused on the question of Special Use Airspace over our country and putting the bee on FAA, and it's you who is to be commended here.

I am also pleased to learn that we have another constituent from Montana, Mr. Todd. You said you were from Pray; just so others may know, Pray is in Paradise Valley in the State of Montana, a very wonderful community. When I first ran for Congress I actually walked across Montana; I started down next to Yellowstone Park and Gardner and walked up Paradise Valley and through Pray.

Mr. TODD. I believe you soaked your feet in the Springs of Chico.

Senator BAUCUS. You're absolutely right. I got shin splints, and I must say that soaking my shins in the hot springs of Chico really didn't work. I finally met a former trainer of the State University of Montana Bobcats track team, and he knew what to do about shin splints. About two days later he took care of me.

But Pray is a very special, gorgeous, beautiful place, and Paradise Valley is very aptly named. It's one of the most beautiful spots, I think, on earth. I'm glad, Mr. Todd, to learn that you're from Pray.

Senator REID. Mr. Chairman, if I could just correct one thing in the record, I have now referred to the full statement of Mr. Todd. For every airliner that takes off, 50 general aviation departures occur, not five as I said. For every airport served by an airline, general aviation serves 24. So that even makes the burden on the FAA larger than I originally stated.

Senator BAUCUS. Thank you all very much. We appreciate your taking the time to come.

The hearing is adjourned.

[Whereupon, at 12:19 p.m., the subcommittee was adjourned, to reconvene at the call of the Chair.]

[Statements submitted for the record and the bills S. 1584 and S. 1792 follow:]

STATEMENT OF
RICHARD E. SANDERSON
DIRECTOR, OFFICE OF FEDERAL ACTIVITIES
U.S. ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE
SUBCOMMITTEE ON HAZARDOUS WASTES AND TOXIC SUBSTANCES
OF THE
COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS
UNITED STATES SENATE

NOVEMBER 24, 1987

Good Morning, Mr. Chairman and members of the Subcommittee. I am pleased to appear before you today to discuss the Environmental Protection Agency's (EPA) experience with the National Environmental Policy Act (NEPA).

I will speak briefly regarding EPA's own NEPA compliance program, and in more detail about the process by which EPA reviews EISs and other NEPA documentation. Finally, I will offer a brief assessment of how the Federal establishment is implementing NEPA.

Within EPA's Office of External Affairs, the Office of Federal Activities (OFA) is responsible for working with other Federal agencies to assure that their activities are planned and implemented in an environmentally sound manner. As part of the Office of External Affairs, OFA provides national program management for two EPA programs directly involving the National Environmental Policy Act. These are (1) EPA's own compliance with NEPA and (2) environmental reviews of Federal agencies' activities under section 309 of the Clean Air Act and NEPA. Let me briefly describe to you these two programs.

NEPA Compliance

Like any other agency, EPA is responsible for the protection and enhancement of environmental quality through its own compliance with the goals and requirements of NEPA. The Agency is responsible for NEPA compliance under the construction grants and NPDES permit programs under the Clean Water Act, research and development programs, and facility support activities. Outside of these named areas the Agency has been exempted by statute from NEPA for activities carried out under both the Clean Air Act and the Clean Water Act. With regard to actions taken under other environmental statutes, it has been EPA policy, supported by a number of court decisions, that its reviews are functionally equivalent to those under NEPA. As part of a 1974 Policy on NEPA compliance, the Agency is committed to prepare environmental impact statements on selected significant regulatory actions. The Agency believed that the preparation of EIS's would have beneficial effects on selected actions, and established procedures for implementing the policy. These so-called voluntary EIS procedures were published in the Federal Register in October 1974. They cover specified actions under the Clean Air Act, the Noise Control Act, the Atomic Energy Act, the Federal Insecticide, Rodenticide, and Fungicide Act, and the Marine Protection, Research, and Sanctuaries Act.

Environmental Reviews

OFA reviews all significant Federal actions as required by section 309 of the Clean Air Act and NEPA. Section 309 requires EPA to review and comment in writing on all major Federal actions subject to NEPA, proposed regulations and Administration proposals for legislation. Under section 309, should the Administrator find any action reviewed unsatisfactory from the standpoint of public health and welfare or environmental quality, he is required to publish his determination and the matter is referred to the Council on Environmental Quality (CEQ). Under CEQ's regulations, all agencies have the authority to review, comment on and, if appropriate, refer Federal actions to the Council if an environmental impact statement (EIS) has been prepared. EPA's authority remains unique, however, since this authority exists by statute under section 309 and applies irrespective of whether an EIS has been prepared.

Section 309 was added to the Clean Air Act in 1970, at the time the NEPA was passed and the Environmental Protection Agency was formed. The rationale was that the EISs that Federal agencies would be developing under NEPA should have an independent review and that the newly formed EPA should perform it.

EPA developed implementing procedures in 1971 to carry out this responsibility and, in conjunction with CEQ, has refined those procedures since then. Operating procedures are contained in the manual, "Policies and Procedures for the Review of Federal Actions Impacting the Environment" (revised in 1984).

In accordance with these operating procedures, EPA reviews, comments, and makes those comments available to the public, on all Federal draft and final EISs, proposed environmental regulations, and other proposed major actions we consider to have significant environmental effects. EPA has reviewed all of the approximately 14,000 draft and final EISs produced since the passage of NEPA. I have attached a summary description of EPA's "309 Review" process to my testimony.

In addition to these major program responsibilities, the Office of Federal Activities administers the information management system that has been developed for the filing of all Federal Environmental Impact Statements. This is done under an agreement with the Council on Environmental Quality. OFA also provides liaison with CEQ for this function and for related aspects of NEPA program administration.

The Office serves as a central point of information for EPA and the public regarding techniques and methodologies for environmental impact assessments. It also monitors agency compliance with a variety of environmental statutes and Executive Orders that are primarily administered by other agencies, such as the Endangered Species Act and the Floodplain Management Executive Order.

Let me provide you with my observations on how we at EPA, through our reviews of Federal actions under NEPA and section 309, view the implementation of NEPA by the Federal Executive Branch. NEPA, of course, was the first of the major environmental statutes passed in the 1970's and has two primary purposes: first, it is designed to ensure that Federal decisionmakers consider the enviromental impacts of their actions, and second, it provides a means by which the public is informed and can participate in the analysis of environmental impacts of a proposal. Thus, from the very beginning of a program design or project analysis, the environmental implications of that action should be considered and incorporated into the decisionmaking process.

To guide Federal agencies in applying NEPA, the Council on Environmental Quality developed a national regulation governing NEPA implementation in 1978. Section 101 of S. 1792 now proposes to remove any doubt that these regulations are in fact binding throughout the Federal Executive branch. Each Federal agency was to develop its own procedures concerning how it will comply with NEPA. The majority of Federal agencies base their compliance on the CEQ regulations.

In general, Federal agency implementation of the NEPA process allows for three basic levels of environmental documentation, depending on the level of potential impact. Those actions which generally have insignificant environmental impacts can, on the basis of an agency's NEPA implementing regulations, be deemed "categorical exclusions." In this instance, an action belongs to a category of actions that historically have not resulted in individual or cumulative impacts, and no documentation is required.

In a second situation, Environmental Assessments (EA's) are prepared when it is unclear whether or not the action will produce significant impacts. Accordingly, the EA allows the

Federal agency to decide whether the action is significant enough to require preparation of an EIS, or to document that no EIS is required. If no EIS is required, a "Finding of No Significant Impact" is issued.

Finally, an EIS must be prepared if an action has the potential for significantly impacting the environment. The decision to require an EIS is generally made early so that meaningful participation by other Federal agencies, other interested groups and the public can begin as early as possible in the review and comment process.

In practice, 10,000 to 20,000 EA's are prepared each year, compared to the annual preparation of approximately 300 draft EIS's. Since EA's can also contain an agency's environmental mitigation plans, these documents are important tools in reducing cumulative impacts on the environment.

We garner major insight into how well an agency has implemented the NEPA process from the quality of its EIS's. If an agency's EIS's reflect a high degree of environmental awareness, it has been our experience that the the agency is carrying out its NEPA responsibilities in both the categorical exclusion and environmental assessment areas as well.

Our reviews of Federal EIS's have shown that the overall quality of the environmental analyses in final EIS's has been good. Generally, we have found that the final selections among the various alternatives generally take into account the environmental analyses that have occurred as part of the NEPA process. That is different from saying that the "environmentally preferable" option is always chosen. However, we are pleased with the increasing willingness we observe on the part of other Federal agencies to receive and accept recommendations at the draft EIS stage. We believe that this acceptance, as well as good agency environmental planning at the early design stages, has led to the generally high quality of the final EIS's we review.

From these results, we conclude that, overall, the implementation of NEPA has succeeded. The major goal of having Federal decisionmakers consider environmental issues in their decisionmaking process clearly has been achieved. Moreover, full participation by all Federal agencies and other relevant entities should be encouraged.

We now see environmental evaluations being woven into the basic fabric of agency decisionmaking. The important task before us remains that of supporting the NEPA effort. I believe this is accomplished through the education, encouragement and assistance of managers in the development of skills necessary to meet the requirements of the Act, as well as an understanding that the primary objectives of their respective agencies can still be effectively carried out.

This concludes my prepared remarks. I would be happy to answer any questions the Subcommittee may have.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

EPA's "309 REVIEW" PROCESS

Section 309 of the Clean Air Act states:

> "(a) The Administrator shall review and comment in writing on the environmental impact of any matter relating to duties and responsibilities granted pursuant to this chapter or other provisions of the authority of the Administrator, contained in any (1) legislation proposed by any Federal department or agency, (2) newly authorized Federal projects for construction and any major Federal Agency action (other than a project for construction) to which Section 4332(2)(C) of this title applies, and (3) proposed regulations published by any department or agency of the Federal Government. Such written comment shall be made public at the conclusion of any such review.
>
> (b) In the event the Administrator determines that any such legislation, action, or regulation is unsatisfactory from the standpoint of public health or welfare or environmental quality, he shall publish his determination and the matter shall be referred to the Council on Environmental Quality."

This section was added to the Clean Air Act in 1970, at the time the National Environmental Policy Act (NEPA) was passed and the Environmental Protection Agency (EPA) was formed. The rationale was that the EISs that Federal agencies would be developing under NEPA should have an independent review and that the newly formed EPA should perform it.

EPA developed implementing procedures in 1971 to carry out this responsibility and, in conjunction with the Council on Environmental Quality (CEQ), has refined those procedures since then. Operating procedures are contained in the manual, "Policies and Procedures for the Review of Federal Actions Impacting the Environment" (revised in 1984).

In accordance with these operating procedures, EPA reviews, comments, and makes those comments available to the public, on all Federal draft and final EISs, proposed environmental regulations, and other proposed major actions we consider to have significant environmental effects. EPA has reviewed all of the approximately 14,000 draft and final EISs produced since the passage of NEPA.

The major elements of the 309 review process include the following:

- EPA reviews and comments on both the adequacy of the analysis and the environmental impacts of the proposed action itself.
- EPA comments on issues related to our "duties and responsibilities," which include all environmental media (i.e., air, water, etc.), methodologies related to media-impact assessment, and areas related to our regulatory responsibilities.

- EPA comments on potential violations of or inconsistency with national environmental standards and determines whether adequate information has been provided to assess potential environmental impacts of the proposed action.

- In general, the degree to which the Agency gets involved in attempting to modify a proposed project depends on the level of environmental impacts, the ability and willingness of the proposing Federal agency to mitigate those impacts, and the level of responsibility EPA has over the type of impact at issue.

- If the action is a Federal project to be located in or on a specific site the appropriate EPA Regional office has the jurisdiction and delegated responsibility for carrying out the §309 CAA review and working with the proposing Federal agency to resolve any problems. If the action by the proposing Federal department/agency is legislative or regulatory, generally the §309 CAA review will be conducted directly in EPA HQ.

- For Federal project cases, EPA Headquarters becomes involved if the Region finds that the proposed action in the draft EIS is "environmentally unsatisfactory," or that the draft EIS is "inadequate" to assess the potentially significant environmental impacts of proposed actions. In these cases, Headquarters must approve the Regional comment letter before it is sent. In addition, EPA Headquarters works with Regional personnel in informing interested parties about the EPA action and will assist the Region, as needed, in meeting with the proposing Federal agency to resolve the issues. The CEQ is always notified of a DEIS which has been rated "unsatisfactory" or "inadequate" by EPA.

- If the Region finds that the subsequent final EIS is still "environmentally unsatisfactory," the Region recommends to the Administrator, through the Office of External Affairs, that the matter be referred to the President's CEQ for resolution. At this time, EPA HQ becomes significantly involved in the factual determination and judgment on the EIS.

- The process is carried out so as to ensure the independence of the EPA review responsibilities and to coordinate in a manner which emphasizes consultation with the lead agency and informing interested parties of EPA actions and concerns.

TESTIMONY OF LUCINDA LOW SWARTZ
DEPUTY GENERAL COUNSEL
COUNCIL ON ENVIRONMENTAL QUALITY
BEFORE THE SUBCOMMITTEE ON HAZARDOUS WASTE AND TOXIC SUBSTANCES
SENATE COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS
November 24, 1987

Mr. Chairman and Members of the Subcommittee:

On behalf of the Council on Environmental Quality (CEQ) and Chairman Hill, I appreciate the opportunity to appear before you today to discuss the reauthorization of the Office of Environmental Quality and specific issues related to federal agency compliance with the National Environmental Policy Act (NEPA). Chairman Hill has submitted a statement for the record which addresses the activities of the Office of Environmental Quality and the Council on Environmental Quality. I will confine my testimony to the questions posed in your letter dated November 17, 1987.

Compliance with CEQ Regulations (Questions 1-3)

Executive Order No. 11991 (amending Executive Order No. 11514) directed CEQ to issue regulations to federal agencies for the implementation of the procedural provisions of NEPA. Such regulations were promulgated in 1978 and became effective and binding on all federal agencies in 1979. To our knowledge, all but one federal agency has complied with the CEQ regulations. That exception is the Federal Energy Regulatory Commission (FERC).

In the past, FERC has argued that CEQ's regulations do not apply to that agency because of its status as an independent regulatory agency. That argument has been put forward by other independent regulatory agencies such as the Nuclear Regulatory Commission. Those agencies, however, have voluntarily agreed to be bound by the CEQ regulations. At least one federal court has also found that the CEQ regulations are binding on FERC. See The Steamboaters v. FERC, 759 F. 2d 1382, 1392-93 (9th Cir. 1985).

CEQ has worked with FERC over the past several months with respect to that agency's compliance with NEPA and the CEQ regulations. In May, 1987, after consulting with CEQ, FERC published draft NEPA-implementing regulations. CEQ had concerns with those draft regulations, particularly the agency's proposal to adopt some of CEQ's regulations, to modify others, and to reject the remainder.

In recent conversations with FERC, I have learned that the staff is recommending to the Commission that the final regulations indicate FERC's voluntary compliance with all of the CEQ regulations; FERC would simply promulgate its own regulations to supplement the CEQ regulations. CEQ wants to commend the FERC staff for the thoroughness with which they reviewed, considered, and responded to the comments received on the proposed regulations. We are hopeful that the proposed final regulations developed by the FERC staff will be approved by the full Commission.

When all federal agencies are bound by and comply with the CEO regulations, a good measure of consistency is introduced into NEPA implementation. This goal of consistency is one which CEQ strives for and one which will be furthered by FERC's adoption of the CEQ regulations.

Use of Preliminary Environmental Assessments (Questions 4,5)

Under NEPA, a federal agency must prepare an environmental impact statement (EIS) when proposing to take an action having a significant impact on the quality of the human environment. If the agency is not certain whether a particular proposal will have significant environmental consequences, it must prepare an environmental assessment (EA). An EA is defined in the CEQ regulations as "a concise public document...that serves to...provide sufficient evidence and analysis for determining whether to prepare an environmental impact statement or a finding of no significant impact...." 40 C.F.R. § 1508.9. Should the EA discover significant environmental impacts related to the proposal, an EIS must be prepared. On the other hand, should the EA reveal no significant impacts, the agency may issue a "finding of no significant impact" (FONSI) and proceed with its action.

There are, however, certain classes of actions which do not have significant environmental impacts. Federal agencies may identify such actions in their implementing regulations and may "categorically exclude" those actions from NEPA review. The CEO regulations define a categorical exclusion as "a category of actions which do not individually or cumulatively have a significant effect on the human environment and which have been found to have no such effect in procedures adopted by a Federal agency in implementation of these regulations...." 40 C.F.R. § 1508.4.

With respect to the NEPA regulations promulgated by the Department of the Navy, it has come to CEQ's attention that two of the categorical exclusions listed are overly broad. Rather than state specific actions (e.g., personnel and contract actions), the Navy's categorical exclusion regulations include "[proposed] actions that, based on sound judgment, are of such an environmentally insignificant nature that they clearly do not meet the threshold for requiring an environmental assessment or EIS" and "other categories identified by the Chief of Naval Operations...." See 32 C.F.R. § 775.6(d)(14) and (15). In a letter dated October 13, 1987, we formally requested the Navy to delete these two subsections. A copy of our letter is attached to this testimony.

Related to the use of these categorical exclusions is the Navy's use of "Preliminary Environmental Assessments" (PEA). I understand that the Navy requires the preparation of a PEA for every action it proposes, including those actions which are categorically excluded. The PEA is not a public document.

It would appear that lengthy and detailed PEA's have been prepared by the Navy for proposed projects which were then categorically excluded from further NEPA review. For example, a PEA would be used to demonstrate that the proposed action was of "such an environmentally insignificant nature that [it] clearly did not meet the threshold" for preparing an EA or EIS. If, however, the use of a categorical exclusion can be justified only through the preparation of a detailed analysis, the insignificance of the environmental impacts is not readily apparent.

Again in our October 13 letter, we asked the Navy to address its use of PEA's in its regulations. While we do not want to discourage an agency from preparing the documentation it believes necessary to meet its obligations under NEPA and other statutes, we want to make it clear that a PEA may not be used to take the place of an EA or an EIS.

The problem of using a PEA to justify the use of the the Navy's two overly broad categorical exclusions would be solved by the deletion of those subsections as requested by CEQ. If the Navy plans to continue to use PEA's in other circumstances, however, it must clarify its procedures in its regulations.

I am not aware of any other federal agencies which, like the Navy, require the preparation of a PEA for every action proposed. There are agencies which require or authorize brief documentation to be prepared verifying that a particular action falls within a stated categorical exclusion category and that no extraordinary circumstances exist which would merit further NEPA review. This type of internal documentation is appropriate.

Special Use Airspace Designations (Questions 6-9)

CEQ was asked by the General Accounting Office (GAO) in May, 1987 for its opinion on the Federal Aviation Administration's (FAA) compliance with NEPA with respect to the designation of special use airspace. At that time, GAO explained that, in issuing special use airspace designations, the FAA simply verifies that the military agency requesting the designation has certified that it has complied with NEPA. The FAA prepares no EA or EIS, nor does it review any environmental documentation prepared by the requesting military agency.

As we have explained to GAO and to the FAA, before approving a special use airspace designation sought by a military agency, it is our legal opinion that the FAA has the responsibility under NEPA to independently evaluate the scope and content of the EA or EIS prepared by the requesting agency. We believe that the FAA is not fulfilling its responsibility by verifying that the military agency has certified NEPA compliance.

While we have not yet asked the FAA to amend its regulations, we have indicated to the FAA that we plan to pursue this issue with them and the affected military agencies. These discussions could well result in a determination that such a regulatory amendment is necessary.

Copies of our correspondence with GAO and the FAA is attached to this testimony.

CEQ has no other experience or knowledge with repect to the military's expansion and use of special use airspace or military training routes, the adequacy of current laws and regulations to protect civilian aviation interests, or the FAA's record in protecting civilian aviation interests.

That concludes my prepared remarks. I would be happy to answer questions on either my testimony or Chairman Hill's statement.

OCTOBER 13, 1987 LETTER FROM CEQ TO DEPARTMENT OF THE NAVY

EXECUTIVE OFFICE OF THE PRESIDENT
COUNCIL ON ENVIRONMENTAL QUALITY
722 JACKSON PLACE N W
WASHINGTON D C 20006

October 13, 1987

Chief of Naval Operations (OP-04)
Department of the Navy
Washington, D.C. 20350

Dear Sir:

This will follow up on a meeting I had with representatives of the Department of the Navy on September 17 at which the Navy regulations implementing the National Environmental Policy Act (NEPA) were discussed. At that meeting, I expressed concern that two subsections of the Navy's categorical exclusion regulations (32 C.F.R. § 775.6(d)(14) and (15)) were overly broad and did not meet the Council on Environmental Quality's (CEQ) definition of "categorical exclusion." By this letter, we are formally requesting that the Navy revise its categorical exclusion regulations and delete those two subsections.

The CEQ regulations require categorical exclusions to be "categories of actions which do not individually or cumulatively have a significant effect on the human environment and which have been found to have no such effect in procedures adopted by a Federal agency...." 40 C.F.R. § 1508.4. Subsection (14), however, seeks to exclude from NEPA documentation "[p]roposed actions that, based on sound judgment, are of such an environmentally insignificant nature that they clearly do not meet the threshold for requiring an environmental assessment or EIS." Similarly, subsection (15) excludes "[o]ther categories as identified by the Chief of Naval Operations...."

These subsections are open-ended and as such allow the Navy to exclude certain actions without going through the regulatory process and without public review. They are not the types of clearly-defined categorical exclusions contemplated by the CEQ regulations. Thus, we request that these subsections be deleted at the earliest possible time.

Related to the use of categorical exclusions is the Navy's use of "preliminary environmental assessments" (PEA). I understand that the Navy requires the preparation of a PEA for every action proposed by the Navy, including those actions which are categorically excluded. I also understand that a PEA is not a public document.

While I do not want to discourage the Navy from preparing the documentation it finds necessary to meet its obligations under NEPA and other statutes, a PEA must not be used to take the place of an EA or an EIS. One beneficial use of a PEA might be to determine whether there were any extraordinary circumstances which would require the preparation of an EA or EIS when a categorical exclusion would ordinarily suffice.

Using a PEA to determine if an EA or an EIS is required, however, is of questionable utitity. If a PEA indicates, for example, that an EIS is not required, does the Navy prepare a finding of no significant impact? Would the PEA be made public at that point to support the issuance of the FONSI? What would happen if the PEA determined that an EA were not necessary, but no categorical exclusion applied?

To avoid these questions and any unnecessary confusion, the Navy NEPA regulations should also be amended to include a discussion of the appropriate use of PEAs.

I look forward to your response to this request to delete Subsections (14) and (15) from the Navy's categorical exclusion regulations and to address the use of PEAs in the regulations. Please do not hesitate to contact me at 395-5754 if you have any questions.

Sincerely,

Lucinda Low Swartz
Deputy General Counsel

cc: Stephen J. Buckley

CORRESPONDENCE FROM CEQ REGARDING FAA NEPA

COMPLIANCE FOR SPECIAL USE AIRSPACE DESIGNATIONS

EXECUTIVE OFFICE OF THE PRESIDENT
COUNCIL ON ENVIRONMENTAL QUALITY
722 JACKSON PLACE N W
WASHINGTON D C 20006

June 4, 1987

HAND-DELIVER

Gary L. Kepplinger, Esq.
Assistant General Counsel
General Accounting Office
441 G Street, N.W.
Washington, D.C. 20548

Dear Mr. Kepplinger:

Re: FAA Management of Special Use Airspace

Your May 1, 1987 letter to Chairman Hill was referred to me for response. I apologize for the delay in providing the information you requested.

In answer to your specific question, CEQ's regulations do not permit the FAA to delegate responsibility for NEPA compliance to the agencies seeking special use airspace from the FAA. Each federal agency which is proposing an action which may significantly affect the quality of the human environment is responsible for preparing the appropriate environmental documentation. See 42 U.S.C. § 4332(2)(C); NEPA, § 102(2)(C).

Although an applicant requesting a federal agency to take a particular action (e.g., to issue a license) can be required to provide information on the potential environmental impacts of the proposal, the federal agency must independently verify the accuracy of the environmental information and is ultimately responsible for the contents of an environmental assessment (EA) or an environmental impact statement (EIS). See 40 C.F.R. § 1506.5. The responsibility of the federal agency does not change when the applicant is another federal agency.

Some confusion may have resulted from an incomplete reading of CEQ's regulation on lead agencies (40 C.F.R. § 1501.5). That regulation states that a lead agency shall supervise the preparation of an EIS if more than one federal agency "[p]roposes or is involved in the same action...." 40 C.F.R. § 1501.5(a)(1). The FAA may have assumed that since military agencies were "proposing" an action, those agencies could be considered "lead agencies" for purposes of EIS preparation. Such an interpretation is incorrect.

The lead agency concept is designed to allow one federal agency to be responsible for an EIS where two or more federal agencies are involved in or are proposing one project. Using the lead agency designation, a single agency oversees the preparation of one EIS covering an entire project.

As outlined in your letter, the FAA establishes and controls special use airspace for military operations, among other things. If there is a question as to whether an FAA decision concerning the designation of special use airspace could have a significant impact on the quality of the human environment, then the FAA must prepare an EA. The FAA can require the military agency seeking the airspace to provide specific environmental information, but the FAA is responsible for the adequacy of the EA prepared. See 40 C.F.R. § 1506.5(b).

It should also be noted that if a military agency prepared an EA regarding its request to the FAA for a special use airspace designation, the FAA could adopt some or all of that EA, but only after independently deciding that it adequately addresses the potential environmental impacts. See 40 C.F.R. § 1506.3 and CEQ Guidance, 48 Fed. Reg. 34263, 34265-66 (1983).

On a final note, CEQ does review the NEPA regulations promulgated by federal agencies to insure that they comply with the Act and CEQ's regulations. See 40 C.F.R. § 1507.5. Had the FAA's interpretation of "lead agency" been included in its NEPA regulations, CEQ would not have approved them. I understand, however, that the discussion of special use airspace is contained in a publication separate from the NEPA implementation regulations.

I hope this information is useful to you. Please feel free to contact me at 395-5754 if you have further questions.

Sincerely,

Lucinda Low Swartz

Lucinda Low Swartz
Deputy General Counsel

EXECUTIVE OFFICE OF THE PRESIDENT
COUNCIL ON ENVIRONMENTAL QUALITY
722 JACKSON PLACE, N W
WASHINGTON, D C 20006

August 12, 1987

E. Tazewell Ellett, Esq.
Chief Counsel
Federal Aviation Administration
800 Independence Avenue, S.W.
Washington, D.C. 20591

Dear Mr. Ellett:

By letter dated May 1, 1987, the General Accounting Office (GAO) sought the views of the Council on Environmental Quality (CEQ) regarding the Federal Aviation Administration's (FAA) interpretation of CEQ's regulations which implement the procedural provisions of the National Environmental Policy Act (NEPA). The information provided in GAO's letter indicated (1) that the FAA has the authority to establish and control special use airspace for military operations, (2) that the FAA has determined that a special use airspace action requires the preparation of an environmental assessment (EA), (3) that the FAA has deemed the military agency seeking the special use airspace designation (referred to as the "proponent") to be responsible for compliance with NEPA "under the lead agency concept," and (4) that the FAA makes no substantive review of the EA prepared by the military agency and simply verifies that the proponent agency has certified NEPA compliance. CEQ was asked to comment on whether its regulations allow the FAA to delegate responsibility for NEPA compliance to agencies seeking special use airspace, given the FAA's final statutory authority over such designations.

Using the information as presented by GAO, and after consulting the Air Force for verification and after attempting to contact the FAA, I responded to GAO by letter on June 4, 1987. In that letter, I stated that the CEQ regulations do not permit the FAA to delegate responsibility for NEPA compliance to the agencies seeking special use airspace from the FAA. I analogized the situation to that of a private applicant seeking approval from a federal agency for a particular action. Thus, I stated that, under 40 C.F.R. § 1506.5, a federal agency can require an applicant (including another federal agency) to provide information on the potential environmental impacts of the proposal, but must independently verify the accuracy of the information and is ultimately responsible for the contents of the EA or the environmental impact statement (EIS).

In addition, I understood that a decision to seek a special use airspace designation from the FAA might also require the preparation of environmental documentation by the proponent military agency. If this were the case, I stated that, under 40 C.F.R. § 1506.3, the FAA could adopt some or all of that NEPA documentation, providing that the FAA found that it adequately addressed the potential environmental impacts. My letter did not suggest that the military agencies have no NEPA role; rather, I indicated that the FAA had incorrectly assumed that its own NEPA role could be delegated to those proponent military agencies.

The FAA took exception to my letter to GAO and requested that I reconsider my position. Representatives from your office, the Air Force, GAO, and I met on June 10, 1987, to discuss the designation of special use airspace; this meeting was followed by correspondence from the FAA and the Air Force. The meeting and subsequent correspondence demonstrate substantial confusion; I will attempt to clarify my thoughts.

The FAA has determined that the designation of special use airspace necessitates the preparation of an _EA_, and requires the proponent military agencies to produce that document "under the lead agency concept." CEQ's lead agency regulations, however, apply only to the preparation of an _EIS_. _See_ 40 C.F.R. § 1501.5. The regulations have not been interpreted to allow agencies to follow the same approach for EA's. The purpose of an EA is to provide a brief analysis of the anticipated impacts of a proposed action, followed by either a finding of no significant impact or a notice of intent to prepare an EIS. A lead agency/cooperating agency arrangement is not necessary in these circumstances.

Of course, as I pointed out in my June 4 letter, the FAA could require the proponent military agency to provide information on the potential environmental impacts of the proposed designation of airspace and could permit the military agency to prepare the _EA_. _See_ 40 C.F.R. § 1506.5(a) and (b). In such a situation, the FAA must independently evaluate the information provided and must take responsibility for the scope and content of the EA. _Id_.

Further, as I also pointed out in my letter, the FAA could adopt all or part of an EA (or an EIS) prepared by the proponent agency on the airspace designation. _See_ 40 C.F.R. § 1506.3 and _CEQ Guidance Regarding NEPA Regulations_, 48 Fed. Reg. 34263, 34265-66 (1983). Again, in adopting another agency's EA, the FAA must independently review that documentation and take full responsibility for its scope and content. _Id_.

Thus, my response to GAO's inquiry remains the same: CEQ's regulations do not permit the FAA to delegate responsibility for NEPA compliance to an agency seeking a special use airspace designation. Although the FAA may permit the proponent agency to prepare an EA for the FAA, or may adopt an EA prepared by the proponent agency for itself, I cannot stress strongly enough that the FAA has an independent responsibility to verify that the documentation prepared by another federal agency accurately addresses the environmental impacts associated with the proposed action and complies with the dictates of NEPA. The FAA may not simply look to see if the proponent has certified NEPA compliance.

I would like to modify the statement I made in my earlier letter regarding CEQ's lead agency regulations. There, and in our June 10 meeting, I implied that a lead agency designation would not be appropriate because this was not a situation where two or more federal agencies were involved in or were proposing one project. Based on the information supplied by GAO, I viewed the respective duties of the FAA and the military agencies as two separate actions.

The FAA has represented, however, and the Air Force apparently agrees, that the military agencies develop and implement proposals to conduct training activities, and the FAA's role is simply to assign an appropriate designation to the airspace involved in the training. Seen in this light, the designation of special use airspace does appear to involve "a group of actions directly related to each other because of their functional interdependence or geographical proximity." 40 C.F.R. § 1501.5(a)(2).

Thus, a lead agency designation is entirely appropriate, if an EIS is required. It is left to the agencies involved to agree which should be the lead agency and which should be the cooperating agency.* CEQ would become involved only if the agencies could not agree. *See* *id.* at 1501.5(e). To date, CEQ has not been requested to determine whether the FAA or a proponent military agency should act as the lead agency for the preparation of an EIS.

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*It does not appear, however, that the FAA and the military agencies have, by mutual agreement, determined that the FAA's role is that of a cooperating agency with the military agencies accepting the role of lead agency. Rather, the FAA seems to have foisted the lead agency role upon the proponent military agencies in an effort to delegate its own NEPA obligations. See FAA Handbook 1050.1D, Appendix 3, §3(b)(1) ("This airspace will not be desiginated...until [t]he notice...contains a statement supplied by the requesting or using agency that they will serve as lead agency for purposes of compliance with NEPA.").

The CEQ regulations would permit a proponent military agency to act as lead agency for the purpose of preparing an EIS for the assignment of special use airspace, should one be necessary. The FAA may act as the cooperating agency. When the FAA approves the formal request of the military agency for the airspace, however, it must prepare a record of decision. *See* 40 C.F.R. § 1505.2. The record of decision may be supported by the EIS prepared by the proponent agency and adopted by the FAA. In adopting the EIS, the FAA must independently verify that it meets the requirements of NEPA. *See* 40 C.F.R. § 1506.3 and *Forty Most Asked Questions Concerning CEQ's National Environmental Policy Act Regulations*, 46 Fed. Reg. 18026, 18035 (1981).

In sum, the CEQ regulations permit the proponent military agency to prepare an *EA* for the assignment of special use airspace by the FAA. The FAA, however, is ultimately responsible for the contents of that document. In addition, the proponent military agency may act as lead agency if it is determined that an *EIS* should be prepared. If an EIS were prepared, the formal airspace designation by the FAA would require a record of decision, supported by the EIS prepared by the proponent and adopted (after independent verification of NEPA compliance) by the FAA. The FAA is not fulfilling its NEPA responsibilities when it merely checks that the military agency has certified that the requirements of NEPA have been satisfied.

I hope that this clarifies the information I provided in my June 4 letter. Please feel free to contact me if you believe additional discussions would be useful.

Sincerely,

Lucinda Low Swartz

Lucinda Low Swartz
Deputy General Counsel

cc: Gary L. Kepplinger, Esq. (GAO)
John McGrail, Esq. (GAO)
Grant C. Reynolds, Esq. (Air Force)

EXECUTIVE OFFICE OF THE PRESIDENT
COUNCIL ON ENVIRONMENTAL QUALITY
722 JACKSON PLACE N W
WASHINGTON D C 20006

November 10, 1987

The Honorable T. Allan McArtor
Administrator
Federal Aviation Administration
800 Independence Avenue, S.W.
Washington, D.C. 20591

Dear Mr. McArtor:

This will respond to your letter dated October 19, 1987. I, of course, am aware of the correspondence which has been circulating among my staff and representatives of the Federal Aviation Administration (FAA), the General Accounting Office (GAO), and the Department of the Air Force on the issue of special use airspace designation. Let me assure you that Ms. Swartz of this office has kept me and the General Counsel informed of her discussions on the subject, and that I believe she has accurately reflected our position.

Thus, before addressing the contents of your letter, I want to reiterate that the FAA, in approving a special use airspace designation sought by a military agency, has the responsibility under the National Environmental Policy Act (NEPA) to independently evaluate the scope and content of the environmental assessment or environmental impact statement prepared by the proponent agency. The FAA is not fulfilling its responsibility by simply verifying that the military agency has certified NEPA compliance.

The requirement for independent evaluation can be found in the CEQ regulations (40 C.F.R. § 1506.3) which were promulgated in 1978 pursuant to Executive Order 11991 and NEPA. The Council has also published guidance on the issue. See 46 Fed. Reg. 18026, 18035 (1981) and 48 Fed. Reg. 34263, 34265-66 (1983).

Early in this Administration, the Vice-President's Task Force on Regulatory Reform instituted a review of federal regulations, including CEQ's NEPA regulations. Similarly, when I became Chairman of CEQ, I began a thorough review of the regulations and sought the comments of federal agencies and the public. In neither the Task Force report nor my own review was any criticism made of the independent evaluation requirement. In fact, I have found that, in general, the CEQ regulations are well-regarded.

The Honorable T. Allan McArtor
November 10, 1987
Page Two

To address the substance of your letter, it is my understanding that representatives of the FAA were indeed contacted prior to our initial response to GAO and were informed of the contents of that response. Further, the procedures which Ms. Swartz stated would not have been approved had they been reviewed by CEQ were FAA's special use airspace regulations (FAA Regulation 7400.2C, § 7005), not the agency's NEPA regulations (FAA Order 1050.1D). While CEQ did approve the FAA's NEPA regulations, a reasonable reading of those regulations does not reveal that the FAA's intent is to do no substantive review of the adequacy of the environmental documentation submitted by another agency. *See* FAA Order 1050.1D, Appendix 3, Section 3(b).

At this time, CEQ is not formally requesting your agency to amend its regulations. I have asked Ms. Swartz to continue to work on this issue and to discuss with your staff and representatives of the affected military agencies possible solutions to the problem. Those discussions, however, might well result in a determination that such an amendment is necessary.

Sincerely,

A. Alan Hill

A. Alan Hill
Chairman

cc: Grant C. Reynolds, Esq.
Department of the Air Force

Ray Clark
Department of the Army

Richard W. Eddy, Esq.
Department of the Navy

John McGrail, Esq.
General Accounting Office

STATEMENT FOR THE RECORD OF
A. ALAN HILL
CHAIRMAN, COUNCIL ON ENVIRONMENTAL QUALITY
AND
DIRECTOR, OFFICE OF ENVIRONMENTAL QUALITY
BEFORE THE
SUBCOMMITTEE ON HAZARDOUS WASTE AND TOXIC SUBSTANCES
SENATE COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS
November 24, 1987

Mr. Chairman and Members of the Subcommittee:

Thank you for the opportunity to offer a statement for the record regarding the reauthorization of the Office of Environmental Quality (OEQ). As you know, OEQ was established by the Environmental Quality Improvement Act of 1970 to provide staff for the Council on Environmental Quality (CEQ). That statute also provides that in my capacity as Chairman of the Council, I serve as Director of OEQ.

Although the Council was given a permanent authorization in the National Environmental Policy Act (NEPA), periodic reauthorization is required for OEQ. In its own proposed legislation sent to Congress in February, CEQ/OEQ sought to reauthorize appropriations of $575,000 for fiscal year 1988, and such sums as may be necessary for fiscal year 1989. S. 1792 would authorize $750,000 for OEQ in fiscal years 1987 through 1989. The Administration opposes this level as unnecessary and not in accord with the President's budget.

In this statement, I will provide a general review of the activities of the Office of Environmental Quality and the Council on Environmental Quality. I will also discuss the implementation of NEPA by federal agencies and our involvement in international environmental issues.

Activities of OEQ and CEQ

The Council on Environmental Quality was created in 1970 to assist the President in the preparation of an annual Environmental Quality Report, to gather timely information on trends in the environment, and to review the programs and activities of other federal agencies for compliance with the goals and directives of NEPA. OEQ was created shortly thereafter to "provide the professional and administrative staff for the Council." Environmental Quality Improvement Act of 1970, § 202(c)(2); 42 U.S.C. § 4371(c)(2).

CEQ/OEQ has divided its responsibilities into three categories for purposes of budget planning: Environmental Policy Analysis and Development, Interagency Coordination of Environmental Quality Programs, and Environmental Data Acquisition and Assessment. I will briefly review our activities in these areas.

Environmental Policy Analysis and Development

The Environmental Policy Analysis and Development program is carried out primarily by the Chairman and the two Council Members. These activities include providing expert opinion and policy advice to the President on environmental matters. Specifically, as Chairman of CEQ, I participate in meetings of the Domestic Policy Council when environmental issues are being discussed, and the other two Members of CEQ serve on two White House Sub-cabinet Working Groups to help oversee and direct the Administration's environmental policy.

Another important Council function is the preparation of the annual Environmental Quality Report. These reports contain information on environmental activities of federal, state, and local government agencies, as well as private entities. The reports also contain CEQ's findings which have been developed through its own studies, work with other federal agencies, and activities authorized by NEPA and other directives. The Council relies on the OEQ, contract studies, and other agencies for assistance in preparation of the reports.

The 16th Environmental Quality Report for the year 1985 was published and made available last summer. Work has begun on the 17th Environmental Quality Report for 1986.

A third aspect of the Council's Environmental Policy Analysis and Development program is our participation in international environmental actitivies. The Council acts in concert with White House advisors and the Department of State and other agencies to develop international environmental policy. For example, our primary international activity in the last year has been the coordination of federal agency activities concerning the World Commission on Environment and Development (WCED), a United Nations sponsored project. A WCED report was issued in April, 1987, and in October, I addressed the United Nations General Assembly to provide the United States' response to that report.

In addition, CEQ interacts as a liaison with representatives of foreign governments and international organizations about global environmental issues. CEQ also provides information and interpretation of Executive Order No. 12114 which outlines policies and procedures for assessing the environmental effects of federal government programs or projects abroad. I will describe our activities under Executive Order No. 12114 in more detail below.

Interagency Coordination of Environmental Quality Programs

The second CEQ/OEQ program activity, Interagency Coordination of Environmental Quality Programs, involves the promulgation and interpretation of regulations implementing the procedural provisions of NEPA, assistance in coordinating federal environmental programs that involve more than one agency, active participation in the OMB coordination and review process for proposed legislation related to environmental quality, and resolution of interagency disputes through the NEPA referral process.

In its interagency coordination function, the OEQ is called upon to review other agencies' NEPA procedures and to advise them with respect to their responsibilities under NEPA and the CEQ regulations. Moreover, the OEQ frequently responds to requests from federal, state and local agencies, and private citizens to examine federal agencies' NEPA compliance for specific proposed actions.

One of CEQ/OEQ's efforts in coordinating federal environmental programs is its participation on the Interagency Task Force on Acid Precipitation (ITFAP) which directs the National Acid Precipitation Assessment Program (NAPAP). NAPAP's Office of the Director of Research is housed in CEQ's offices, and one Member of the Council serves as Executive Secretary for ITFAP. The Task Force carries out the National Acid Preceipitation Assesessment Program with funds appropriated to individual federal agencies in accordance with a mutually agreed upon research plan. CEQ/OEO provides administrative and financial management assistance to NAPAP.

The OEQ staff has continued to implement certain recommendations contained in the 1985 CEQ Report on Long-Term Environmental Research and Development. For example, CEQ, along with other federal agencies, jointly sponsored a meeting to provide initial guidance on the identification of specific research projects that could be integrated into existing hazardous waste clean-up activities. Further, with assistance from EPA and the National Institute for Environmental Health Sciences, OEQ contracted with the Conservation Foundation for the convening of an experts' meeting for the preparation of a report on multimedia effects from a single pollutant. In another project with the Office of Science and Technology Policy and the National Science Foundation, OEO is conducting a major review of the scientific basis for risk assessment assumptions.

With respect to proposed legislation having environmental impacts, the Council Members and General Counsel regularly provide substantive comments to the Office of Management and Budget and to the Congress.

Environmental Data Acquisition and Assessment

In its Environmental Data Acquisition and Assessment program, CEQ's objective is to improve federal data and monitoring capabilities and to track the numerous environmental research and monitoring programs of federal agencies. The most important activity in this regard is an interagency effort, coordinated by CEQ/OEQ, to update information about environmental data sources and to produce an Environmental Trends Sourcebook. Work is proceeding on this report; we expect to complete it in the near future.

Another environmental data function is technical responsibility associated with toxic substances and chemicals of environmental concern. I serve as a joint chairman, with EPA's Administrator, of the Interagency Toxic Substances Data Committee. Representatives of CEQ/OEQ also attend meetings of the Interagency Testing Committee established under the Toxic Substances Control Act.

OEQ Management Fund

In addition to assisting the Council in meeting its three primary areas of responsibility, OEQ has been authorized to establish a Management Fund to receive advance payments from other agencies to finance studies that are jointly sponsored by OEQ and other federal agencies and federal interagency environmental projects in which OEQ participates. 42 U.S.C. § 4375(a). This fund was established by Congress in 1985 and has been used to fund interagency environmental policy studies as well as interagency task forces such as ITFAP. Previously, OEQ had conducted such studies using an administratively established consolidated working fund.

The Management Fund mechanism provides OEQ with rapid access under contract to a wide latitude of specialized expertise. CEQ/OEQ can thus address a broad variety of emerging issues in a cost-effective manner. Moreover, the Management Fund facilitates the participation of other federal in joint projects and allows CEQ/OEQ to more effectively exercise its role as an environmental coordinator. The Director is required to publish internal policies and procedures to govern its operation. Further, to insure accountability, the annual budget estimates for the Management Fund are presented as a separate schedule in the Appendix for the Budget of the United States. Detailed information is included in the budget narrative presented by CEQ/OEQ for each fiscal year.

All work financed from the Management Fund supports one or more of the three major agency programs described above. All proposed projects are first reviewed for scientific merit and technical validity; as Director of OEQ, I then look at the project's potential for contributing to the goals of CEQ and NEPA. All Management Fund studies or projects involve an area of special interest to CEQ/OEQ and/or require our participation to insure objectivity. OEQ is continually on guard to prevent the use of the Management Fund for unrelated projects or for the purpose of avoiding regular contracting procedures.

NEPA Implementation by Federal Agencies

The National Environmental Policy Act gave CEQ significant responsibility for overseeing implementation of the requirements of NEPA. Shortly after its establishment in 1970, CEQ issued guidelines to direct the federal agencies' compliance with the requirement found in Section 102(2)(C) of NEPA to prepare a "detailed statement" on proposals for legislation and other major federal actions significantly affecting the quality of the human environment. This "detailed statement" developed into what we now know as the environmental impact statement (EIS). CEQ revised its guidelines in 1971 and 1973, but they were advisory rather than binding on federal agencies.

By the mid-1970's significant problems had become associated with the NEPA process. As the number of court cases increased, so too, the number of pages in EIS(s) doubled and tripled, and complaints about the paperwork and delay associated with the process were frequently heard.

In an effort to provide better management of the process, President Carter issued Executive Order No. 11991 (amending Executive Order No. 11514) in 1977. Executive Order No. 11991 provided to CEQ the legal authority to issue regulations to federal agencies for the implementation of the procedural provisions of NEPA, and to include in those regulations a referral process to CEQ of conflicts between agencies concerning NEPA implementation. The Executive Order directed that the regulations be "designed to make the environmental impact statement more useful to decisionmakers and the public; and to reduce paperwork and the accumulation of extraneous background data, in order to emphasize the need to focus on real environmental issues and alternatives."

After an extensive and commendable effort involving the federal agencies, state and local governments, business and industry and environmental organizations in the formulation of the regulations, CEQ issued the NEPA regulations on November 29, 1978. They became effective for all federal agencies in 1979.

Shortly after the Reagan Administration took office, the NEPA regulations were reviewed by the President's Task Force on Regulatory Reform. The CEQ regulations received favorable comment, and no grounds for major revisions were noted. I instituted our own review of the regulations, including seeking public comments, and determined that they were generally working well. Certain areas were identified in which further guidance in interpreting the regulations would be helpful. This guidance was issued in the form of a memorandum to heads of agencies and published in the Federal Register in 1983. 48 Fed. Reg. 34263 (1983).

Amendment of 40 C.F.R. § 1502.22, Incomplete or Unavailable Information

CEQ has amended one of the NEPA regulations which outlines the responsibilities of a federal agency which, in the course of preparing an environmental impact statement for a particular proposal, finds that there is incomplete or unavailable information relating to significant adverse effects on the human environment. This is the regulation which originally contained the "worst case analysis" requirement. 40 C.F.R. § 1502.22. In 1984, CEQ published an Advance Notice of Proposed Rulemaking for that regulation, 49 Fed. Reg. 50744 (1984), and in 1985, CEQ published a proposed amendment to the regulation. 50 Fed. Reg. 32234 (1985). On April 25, 1986, CEQ published the final amendment to the regulation. 51 Fed. Reg. 15625 (1985).

The amended regulation retains the requirement that agencies disclose the fact that there is incomplete or unavailable information related to significant adverse effects on the human environment. It also retains the requirement for the agency to obtain that information if it is essential to a reasoned choice among alternatives and the overall costs of obtaining it are not exorbitant. If the agency is unable to obtain that information because the overall costs are exorbitant or because the means to obtain it are not known, the agency must 1) affirmatively disclose the fact that such information is unavailable; 2) explain the relevance of the unavailable information to the evaluation of impacts; 3) summarize the credible scientific evidence which is relevant to the agency's evaluation; and 4) evaluate the environmental impacts based upon theoretical approaches or research methods generally accepted in the scientific community. The amendment also specifies that impacts which have a low probability of occurrence, but which will have catastrophic consequences if they do occur, must be evaluated if the analysis is supported by credible scientific evidence and is not based on pure conjecture, and is within the rule of reason.

The amended regulation went into effect on May 27, 1986, and is applicable to all EIS(s) for which a Notice of Intent was published in the Federal Register after that date. For EIS(s) in progress at that time, agencies are free to comply with either the original or the amended regulation.

The first EIS of which we are aware which contains an analysis in response to this amended regulation is the U.S. Forest Service's supplemental EIS for the Amendment to the Pacific Northwest Regional Guide, dealing with Guidelines for Spotted Owl Management in the National Forests in the Northwest. That EIS has been published in draft form. We have reviewed the comments which the Forest Service received dealing with compliance with the amended regulation, and discussed them with representatives of the Forest Service. A final EIS has not yet been issued.

Referral Concerning Proposed Amendments to U.S. Army Corps of Engineers' NEPA Procedures.

A major NEPA issue before CEQ this last year was a referral from the Environmental Protection Agency (EPA) concerning the proposed amendments to the Army Corps of Engineers' (Army) NEPA procedures. The matter was referred to CEQ in February, 1985, under Section 309 of the Clean Air Act and Part 1504 of the CEQ NEPA regulations. At the request of the parties, CEQ granted several extensions of time to permit the Army and EPA to negotiate further. Attempted compromises between the Army and EPA were unsuccessful, and the matter was resubmitted to CEQ by EPA on December 11, 1986.

The proposed amendments to the Corps' NEPA procedures encompass both the regulations for the Corps' own actions and for its permit programs, principally Section 404 permits under the Clean Water Act and Section 10 of the Rivers and Harbors Act. There were four major points of controversy: 1) scope of analysis (popularly known as the "small federal handle issue"); 2) purpose and need section; 3) alternatives in an environmental assessment, and 4) page limits for EIS(s).

CEQ held three meetings, open to the public, to discuss the referral. At the first meeting, the CEQ General Counsel briefed the Council Members and myself on the issues in the referral. At the second meeting, we heard from representatives of EPA and the Army and other interested federal agencies. At the third meeting, we heard from interested parties outside of the federal government, including representatives from many public interest organizations.

CEQ also accepted written comments about the issues raised in the referral. We received about 63 letters for the record, including letters signed by a total of fifteen Senators and Congressman. Those lettters, as well as all of the other letters, demonstrated a sharp difference of opinion about the issues.

The Council issued its recommendation in May, 1987. A copy of our determination is attached to this statement.

Other NEPA Issues

In terms of other NEPA issues, I believe that in many agencies, NEPA has become an integral part of the planning and decisionmaking process. I have been pleased to note a recent decline in NEPA litigation. Of course, all agencies continue to grapple with particular NEPA problems for particular proposals.

The questions of whether to prepare an EIS for a particular proposal and how much analysis constitutes an adequate EIS have been and continue to be ongoing questions for all of the agencies. In the past few years, the issue of how to analyze cumulative impacts has received much more attention, both in the agencies and in the courts. This issue has particular significance in dealing with multiple projects on a single river basin, estuary, or other sensitive ecological area.

The problem of monitoring the commitments made in environmental impact statements is also an issue of growing concern. H.R. 2020 as passed by the House of Representatives and S. 1792 propose to address this concern by requiring each federal agency to review "a statistically significant random sample" of EIS's prepared "in which measures were specified for the mitigation of the adverse impact on natural resources including fish and wildlife populations and habitat." The agencies must review (1) the extent to which mitigation measures were implemented, (2) the accuracy of the predicted impact on fish and wildlife as detailed in the EIS for the proposed action, and (3) the effectiveness of the mitigation measures. The results of the reviews are to be forwarded to CEO which then prepares an annual report to Congress.

While I believe that a review of mitigation implementation may be appropriate, the process described in the proposed legislation could prove to be quite burdensome on federal agencies. We suggest that federal agencies be required to undertake a one-time review of the mitigation measures imposed in a representative sample of EIS's, the accuracy of the predictions made in those EIS's, and the effectiveness of the mitigation measures. These mitigation reviews should not be limited to fish and wildlife impacts, but should include the mitigation measures imposed for all adverse environmental impacts identified in the EIS's. The agencies would submit their analyses to CEO which would report to Congress and make recommendations regarding the need for additional, periodic mitigation implementation reviews.

Another current issue is the application of NEPA to research proposals, particularly in the area of biotechnology and genetic engineering. OEQ is working with the agencies to advise them regarding implementation of NEPA for these types of projects.

Questions have also been raised recently about the relationship between NEPA compliance and other environmental laws. This issue has recently focused on the responsibility of federal agencies to clean up federal facilities under Superfund. Some agency representatives are questioning the applicability of NEPA to these clean-ups in light of the new amendments to Superfund, which provide for a substantive clean-up standard and for public involvement. A major concern is the vulnerability of federal agencies to litigation under NEPA which could potentially slow down clean-ups. OEQ is currently holding discussions with other federal agencies about this, and we will be formulating a position about the issue.

International Environmental Issues

World Commission on Environment and Development

CEQ participates actively in international environmental activities and in the resolution of issues which go beyond national boundaries. As mentioned earlier, CEQ's primary international activity in FY 1986 and FY 1987 has been to coordinate federal agency activities concerning the World Commission on Environment and Development (WCED). This independent body is an outgrowth of a United Nations General Assembly resolution aimed at preparing an "Environmental Perspective to the Year 2000 and Beyond". The WCED examined an array of topics including air, water, and ocean pollution; hazardous and nuclear waste; deforestation and soil erosion; human shelter; land tenure; and industrial and environmental controls. The Commission issued a report in April, 1987, which analyzed, among other things, the impact of agriculture, energy, and forestry policies on the ecological, environmental and natural resources problems of developing countries.

Because the scope of the WCED Report is so wide, with no issue central to one federal agency, the Department of State assigned a foreign service officer to act as Senior Policy Advisor to the Council to deal with the WCED report and other international environmental issues.

CEQ/OEQ has also coordinated the development of a long-term strategy for environmental protection and rational use of natural resources in countries which are members of the United Nations' Economic Commission for Europe (ECE). The strategy, being developed under the direction of senior advisors to ECE on environmental problems, is intended to serve as a comprehensive framework for environmental policy and program responses for member governments through the year 2000. In September, OEQ headed a delegation attending an ECE seminar in Poland on the environmental impact assessment process.

Climate Change Due to the Greenhouse Effect and Stratospheric Ozone Depletion

Another issue with international implications is the concern over depletion of the ozone layer and related issues of climate change due to the greenhouse effect. These issues have, of course been receiving a great deal of study in the scientific community, and much attention in the press. CEQ has also received a request from a number of Senators to examine this issue in the context of the NEPA process. OEQ did an informal survey of federal agencies to identify EIS(s) which have addressed the impacts of climate change due to the greenhouse effect and ozone depletion. Only three such EIS(s) were found and, as a result, the Council has decided to examine more closely the manner in which federal agencies consider these environmental impacts.

Specifically, the Council has held several public meetings in which we were briefed by experts on the scientific questions and on the human health and terrestrial impacts of the problem. Further meetings will be held with federal agencies and members of the public to address the issue of global warming and stratospheric ozone depletion.

International Environmental Impact Assessment Processes

One particularly significant development in the area of environmental impact assessment procedures is the development of Principles and Guidelines under the aegis of the United

National Environment Programme (UNEP). OEQ has been involved in the working group which developed the Principles and Guidelines. Those Principles and Guidelines were considered at the UNEP Governing Council session this June in Nairobi, Kenya. At that time, the Governing Council authorized further work to promote use of the Principles and Guidelines by members of the United Nations. I believe that the multi-lateral development banks should also be encouraged to adopt the Principles and Guidelines. I will be making every effort to achieve these goals this year and in the future.

Bi-Lateral Agreements (Soviet Union and Japan)

CEQ/OEQ is also involved in bi-lateral agreements on environmental law and environmental impact assessment. Under the Agreement on Cooperation in the Field of Environmental Protection between the United States and the Soviet Union, the CEQ General Counsel is the project leader for Area XI, "Legal and Administrative Measures for Protecting Environmental Quality". Earlier this year, under that Agreement, we served as host to two Soviet environmental attorneys who studied in the United States for three months. In 1988, a delegation of seven Soviet attorneys will visit the United States for two weeks.

Under the Agreement between the Government of the United States and the Government of Japan on Cooperation in the Field of Environmental Protection, the CEQ General Counsel serves as project leader for the area dealing with environmental impact assessment. This has assumed significance recently as Japan is in the beginning years of implementing environmental assessment procedures. OEO staff headed a delegation of specialists in a meeting on environmental impact assessment held in Japan this year.

Executive Order No. 12114

CEQ also has some responsibility for the implementation of Executive Order No. 12114, entitled "Environmental Effects of Major Federal Actions Abroad". This Executive Order was developed because of a continuing controversy over whether Congress intended NEPA to apply to environmental effects outside of the United States. After a great deal of debate, Executive Order No. 12114 was issued on January 4, 1979. It is not based on NEPA, although it is intended to further the goals of NEPA, and it does not give rise to a cause of action in the courts.

Executive Order No. 12114 directs all federal agencies to develop their own implementing procedures, in consultation with CEQ and the Department of State. It requires agencies to prepare either environmental impact statements, bilateral or multilateral environmental studies, or concise reviews (depending upon the nature of the action) for major federal actions significantly affecting the environmental quality of the global commons or of a foreign nation not participating with the United States and not otherwise involved in the action; and for major federal actions significantly affecting the quality of the environment of a foreign nation which provide to that nation either a product or project involving an item which is prohibited or strictly regulated by federal law in the United States because its toxic effects on the environment create a serious public health risk, or a physical project which involves radioactive substances. It also applies to major federal actions which significantly affect natural or ecological resources designated by the President as deserving of special protection under Executive Order No. 12114. The order contains a number of exemptions for such acts as disaster and emergency relief actions, and actions taken by the President.

CEQ has published six progress reports on agency procedures implementing Executive Order No. 12114. The last such report was published on November 21, 1980 (45 Fed. Reg. 77106 (1980)). We have recently commenced another comprehensive examination of implementation of the order by all federal agencies. Many, but not all, agencies have published implementing procedures. CEQ continues to address specific questions raised by agencies in relation to compliance with Executive Order No. 12114.

RECOMMENDATIONS OF CEQ REGARDING PROPOSED AMENDMENTS TO THE ARMY CORPS OF ENGINEERS' PROCEDURES IMPLEMENTING NEPA

(On Referral from EPA)

52 Fed. Reg. 22517 (June 12, 1987)

COUNCIL ON ENVIRONMENTAL QUALITY

Implementation of National Environmental Policy Act; Council Recommendations

AGENCY: Council on Environmental Quality, Executive Office of the President.

ACTION: Information only. Recommendations of the Council on Environmental Quality regarding the proposed amendments to the Army Corps of Engineers' Procedures Implementing the National Environmental Policy Act.

SUMMARY: The Council on Environmental Quality's (CEQ) regulations for the implementation of the National Environmental Policy Act (NEPA) includes procedures for referring to CEQ federal interagency disagreements concerning proposed major federal actions that might cause unsatisfactory environmental effects (40 CFR Part 1504).

On January 11, 1984, the U.S. Army Corps of Engineers published proposed amendments to the Army NEPA procedures. On February 25, 1985, the Environmental Protection Agency referred the proposed amended regulations to CEQ. Following interagency negotiations, the matter was re-referred to CEQ by Administrator Thomas on December 11, 1986.

After extensive study of the proposed amendments to the Army regulations, including participation from all

interested agencies and members of the public. CEQ has concluded its examination of the proposed amendments and has reached a consensus on findings and recommendations about the issues raised in the referral. To summarize those findings and recommendations:

The Army's current regulation addressing the scope of analysis can "federalize" private or state or local projects over which, absent one Army permit, the federal government has neither control or responsibility. CEQ finds that Army's proposal to amend this regulation is generally within reasonable, implementing agency discretion and that policy and management considerations favor amending the regulation to provide formal and consistent guidance to Army field personnel.

However, CEQ offers comments and recommendations to improve the usefulness of the Appendix B guidance to District Commanders charged with determining the scope of analysis.

With respect to the amended regulation on purpose and need, CEQ finds that the proposed regulation is generally adequate, but recommends that additional language be inserted in the amendment to the effect that the agency must, in all cases, exercise independent judgment regarding the public purpose and need of the proposal.

When preparing an environmental assessment, there is no legal requirement to include a specific reference to "water dependent activities" under the section 404(b)(1) guidelines in the Army's NEPA procedures. However, CEQ recommends that in the spirit of consistency with the CEQ regulations and as sound management policy, specifically to reduce duplication and paperwork and to increase efficient compliance with both NEPA and the Clean Water Act, the Army's procedures retain the requirement to integrate into the environmental impact analysis the alternatives to non-water dependent activities under section 404(b)(1).

CEQ finds that the Army's proposed regulation concerning page limits to be premature in that the Army has not presented any evidence demonstrating that there has been a conscious effort to abide by the CEQ page limit recommendations. CEQ recommends that the Army attempt concerted compliance with the CEQ regulation before proposing a reduced page limit length.

Dated: June 8, 1987.

A. Alan Hill,

Chairman.

COUNCIL ON ENVIRONMENTAL QUALITY

Findings and Recommendations on Referral From U.S. Environmental Protection Agency Concerning Proposed Amendments to U.S. Army Corps of Engineers Procedures for Implementing the National Environmental Policy Act

Introduction

Section 309 of the Clean Air Act and the Council on Environmental Quality's (CEQ) regulations implementing the procedural provisions of the National Environmental Policy Act (NEPA) direct the Administrator of the Environmental Protection Agency (EPA) to review and comment publicly on the environmental impacts of federal activities, including proposed regulations published by a department or agency. If, upon review, the "Administrator determines that the matter is 'unsatisfactory from the standpoint of public health or welfare or environmental quality,' section 309 directs that the matter be referred to the Council." (40 CFR 1504.1(b))

On January 11, 1984, the U.S. Army Corps of Engineers (Army) published proposed amendments to the Army NEPA procedures. On March 12, 1984, EPA submitted written comments to the Army pursuant to section 309 of the Clean Air Act. After several months of discussion between EPA and the Army, the Army transmitted draft final regulations to CEQ on January 28, 1985. The EPA determined that the proposed regulations were "unsatisfactory" and on February 25, 1985, referred the proposed amended regulations to the Council of Environmental Quality.

In his original letter referring the matter to CEQ, Administrator Lee Thomas stated that Army's proposal would have an adverse effect on EPA's program to review significant environmental impacts of proposed federal actions, and its ability to prevent unacceptable adverse effects of dredge and fill discharges under section 404 of the Clean Water Act. On April 18, 1986, after several extensions of time at the request of the Army,[1] the Army responded to EPA's referral, stating that its latest proposal indicated a good faith effort to reach a compromise with EPA and was well within the range of reasonable agency discretion.

At the request of Army, CEQ returned the referral on May 1, 1986, to EPA for further negotiation by the referring and lead agencies. (40 CFR 1504.3(f)(5)).[2] However, further negotiations between Army and EPA were unsuccessful, and the disagreement was resubmitted to CEQ by EPA on December 11, 1986. In that letter, Administrator Thomas stated that:

> "... EPA and [Army] continued working to resolve issues in the referral. We appreciated the opportunity to negotiate on the proposed regulatory language, but regret there are remaining unresolved substantive concerns which must be addressed.
>
> "We are at a stage in this effort where the opportunity to initiate the Council's Sunshine Act authority ... would help to expedite a mutually satisfactory resolution to the outstanding issues. The potential environmental consequences of these issues are so significant as to warrant comment from interested parties from outside of the lead and referring agencies." *Letter from the Honorable Lee M. Thomas, Administrator of Environmental Protection Agency to the Honorable A. Alan Hill, Chairman, Council on Environmental Quality, December 11, 1986.*

CEQ commenced its consideration of this referral by announcing a series of Sunshine Act meetings to facilitate the participation of outside parties. On January 8, 1987, CEQ held a meeting, open to the public, for the purpose of being briefed by the CEQ General Counsel on the issues raised in the referral. On January 22, 1987, CEQ held a second meeting, open to the public, to hear from the representatives of the Army, EPA, and other federal agencies regarding the issues raised in the referral. At a third meeting, held on February 5, 1987, members of the public had an opportunity to present views on the issues raised in the referral to the CEQ. Finally, written comments were received by CEQ from December 23, 1986 to February 11, 1987.[3] The Council sincerely appreciates receiving the diverse views of all interested parties. The Council has made copies of information presented to it available to all interested parties.

Major Issues and Standard of Review

To facilitate its review, CEQ has identified four major issues in dispute: (1) Scope of analysis, or "small federal handle" issue; (2) purpose and need; (3) analysis of alternatives in environmental assessments; and (4) page limits on environmental impact statements. These findings and recommendations will address each of these issues.

The issues raised in this referral contain elements of both law and policy. CEQ has arrived at its findings of law by considering the requirements of NEPA, the directives of Executive Order 11514, as amended by Executive Order 11991 (Protection and Enhancement of Environmental Quality), and the CEQ regulations implementing the procedural provisions of NEPA. Further, CEQ has evaluated the issues in light of relevant case law and in light of the "rule of reason" as expressed in those cases.

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[1] Footnotes at end of article.

CEQ's recommendations regarding the referral issues reflect both NEPA policy considerations and this Administration's policies towards regulatory reform, as well as CEQ's concern for efficient management of the NEPA process. CEQ is also cognizant of the directive to the Army from the Presidential Task Force on Regulatory Relief, which states that:

> "The Army will also revise its own regulations to reduce substantially the time it currently takes to prepare Environmental Impact Statements and other documents required by the National Environmental Policy Act." *Administrative Reforms to the Regulatory Program Under Section 404 of the Clean Water Act and Section 10 of the Rivers and Harbors Act*, p. 3, transmitted by letter from Christopher DeMuth, Executive Director, Presidential Task Force on Regulatory Relief, to the Honorable William R. Gianelli, Assistant Secretary of the Army (Civil Works), May 7, 1982.

There should be no confusion on the part of a federal agency as to what the goals of regulatory relief really are. It is *not* an exercise in relieving the Army or any other federal agency from fulfilling its procedural responsibilities under NEPA. The goal of regulatory relief is to relieve the private sector of government-induced and imposed regulatory burdens, delays, and expense that exceed what is clearly required by law.

CEQ also notes that, at this time, it is not reviewing the proposed regulations for more minor, technical changes. Such review will take place after the proposed revisions to Army's regulations are submitted to CEQ under 40 CFR 1507.3(a) of the CEQ NEPA regulations for review for conformity with NEPA and the CEQ regulations.

Findings and Recommendations

1. Scope of Analysis.

Abstract

The Army's current regulation addressing the scope of analysis can "federalize" private or state or local projects over which, absent one Army permit, the federal government has neither control or responsibility. CEQ finds that Army's proposal to amend this regulation is generally within reasonable, implementing agency discretion and that policy and management considerations favor amending the regulation to provide formal and consistent guidance to Corps field personnel.

However, CEQ offers comments and recommendations to improve the usefulness of the Appendix B guidance to District Engineers charged with determining the scope of analyses.

The issue before us is the Army's guidance to its District Commanders for determining the scope of analysis of impacts and alternatives for purposes of NEPA compliance when the proposed federal action is an Army Corps of Engineers permit. Generally speaking, the permit actions subject to this guidance are dredge and fill permits under section 404 of the Clean Water Act and section 10 permits under the Rivers and Harbors Act of 1899.

The current Army regulation reads, in relevant part:

> "The EA [Environmental Assessment] shall be a brief document (should normally not exceed 15 pages) primarily focusing on whether or not the entire project subject to the permit requirement could have significant effects on the environment. . . . (For example, where a utility company is applying for a permit to construct an outfall pipe from a proposed power plant, the EA must assess the direct and indirect environmental effects and alternatives of the entire plant.)" 33 CFR Part 230, Appendix B, Section 8(a).

The proposed Army regulation reads:

> "Scope and Analysis
>
> "(1) In some situations, a permit applicant may propose to conduct a specific activity requiring a Department of the Army permit (e.g., construction of a pier in a navigable water of the United States) which is merely one component of a larger project (e.g., construction of an oil refinery on an upland area). The district commander should establish the scope of the NEPA document (e.g., the EA or EIS [Environmental Impact Statement]) to address the impacts of the specific activity requiring a Department of the Army permit and those portions of the entire project over which the district commander has sufficient control and responsibility to warrant Federal review.
>
> "(2) The district commander is considered to have control and responsibility for portions of the project beyond the limits of [Army] Corps jurisdiction where the Federal involvement is sufficient to turn an essentially private action into a Federal action. These are cases where the environmental consequences of the larger project are essentially products of the Corps permit action. . .
>
> "(3) For those regulated activities that comprise merely a link in a transportation or utility transmission project, the scope of analysis should address the specific activity requiring a Department of the Army permit and any other portion of the project that is within the control or responsibility of the [Army] Corps of Engineers. . . ." 33 C.F.R. Part 230, Appendix B, Section 7(b).

The Army's current regulation addressing the scope of analysis can "federalize" private or state or local projects over which, absent one Army permit, the federal government has neither control or responsibility. The Army has regarded the current regulation as overly expansive, and, indeed, has implemented it by employing a rule of reason and common sense. The federal courts have also evaluated the proper scope of analysis by examining the facts of a particular case. Thus, in *Winnebago Tribe of Nebraska v. Ray*, 621 F.2d 269 (8th Cir.), *cert. denied*, 449 U.S. 836 (1980), the United States Court of Appeals for the Eighth Circuit determined that an EA prepared by the Army for a Section 10 permit under the Rivers and Harbors Act for a river-crossing portion of a proposed transmission line need not examine the impacts of and alternatives to the entire transmission line. In that case, the river-crossing portion of the line was approximately 1.25 miles out of 67 miles. Given the facts surrounding the construction of that particular transmission line (for example, no direct or indirect federal funding for the project), the court found that the Army did not have such sufficient control and responsibility over the entire project such that nonfederal segments had to be included in the environmental assessment.

In *Save the Bay, Inc.* v. *Corps of Engineers*, 610 F.2d 322 (5th Cir.), *cert. denied*, 449 U.S. 900 (1980), the United States Court of Appeals for the Fifth Circuit upheld the Army's determination that the issuance of permits for installation of an effluent pipeline in navigable waters to serve a chemical manufacturing plant was not a major federal action significantly affecting the quality of the human environment, and thus did not require an EIS, even though the factory that the pipeline was to serve would have major impacts on the surrounding counties. This case has been frequently cited as support for the Army's current proposal. However, the court noted that it was not expressing an opinion as to the proper scope of an EIS should one have been necessary; rather, its holding rested on its conclusion that the granting of the pipeline construction permit, after issuance by EPA of a National Pollutant Discharge Elimination System permit was not a "major federal action" requiring an EIS. In so deciding, the court noted that the Clean Water Act specifically exempts the issuance of such permits from NEPA review, and prohibits any other federal agency from reviewing any effluent limitations established by such a permit.

The holdings in both of these cases have been adopted by the Army in guidance to field offices, issued in August of 1980. Since that date, the Army has reduced the number of EISs considerably[4] and no appellate court has overturned the Army guidance based on the above two cases.[5] Further, the type of action which was the subject of the *Save the Bay* case is now included within the Corps' system of nationwide permits and is categorically excluded from NEPA review. It is also important to note that no decision in any court has held that implementation of the current Army regulation is improper, inappropriate, or illegal.

Given this history of the implementation of the current Army regulation, the question has been asked—why change this regulation at all? An argument can be made that the implementation—as opposed to the letter—of Army's current implementing procedures has been fair and reasonable and has not been unduly burdensome. While such an argument has some appeal, CEQ finds that the Army's proposal is generally within reasonable implementing agency discretion and that policy and management considerations favor amending the regulation to provide formal and consistent guidance to the Army's field personnel.

However, CEQ offers the following comments and recommendations to improve the usefulness of the Appendix B guidance to District Commanders charged with determining whether the scope of analysis would be confined to the direct, indirect and cumulative effects of (1) the Army's permit action only, or (2) the Army's action *and* additional portions of the overall project having federal involvement or, (3) the entire project. In general, this will be determined by the degree of federal control and responsibility based on the facts and circumstances of each individual case. The proposed amendment enumerates four factors to be considered in making this determination. While these factors appear to be helpful in determining the extent of those actions within the Army's control and responsibility, they do not seem to us to be as useful in determining the extent of cumulative federal involvement. Also, they appear to envision only two opposite poles of federal involvement: those portions requiring the Army's permit, and the entire project. Surely there will be cases that fall somewhere in between. It strikes us that the District Commander's determinations would be made more accurately and more consistently if a process were followed to explicitly take into account the extent of cumulative federal control and responsibility which may (depending on the facts in each case) extend beyond the Army's own control and responsibility to that of other federal agencies involved in the project. Once that "scope of action" is determined (which could include the entire project if the cumulative federal control and responsibility is determined by the Army to be sufficiently great), then the direct, indirect, and cumulative effects of such federal action would be subject to analysis for purposes of NEPA compliance.

Specifically, CEQ offers the following comments on the specific factors proposed in the Army's Appendix B guidance:

(i) Whether the regulated activity comprises "merely a link" in a corridor type project (e.g., a transportation or utility transmission project). CEQ finds that this factor is consistent with NEPA case law[6] and recommends retention of this factor.

(ii) Whether there are alternatives available to the applicant that would not require an Army permit. CEQ observes that this factor is inappropriately narrow. There is no compelling reason why the existence of an alternative method of achieving a proposal without an Army permit (an alternative which the applicant, by definition, has not pursued) should weigh in favor of less comprehensive environmental review.[7] CEQ recommends that the Army reconsider this factor, and if it believes it is useful, better articulate the logical relationship between alternatives available to the applicant and the District Commander's determination of the appropriate scope of analysis.

(iii) Whether there are aspects of the upland facility in the immediate vicinity of the regulated activity which affect the location and configuration of the regulated activity. CEQ finds that this factor is consistent with NEPA and NEPA case law. For purposes of clarification, CEQ recommends adding specific examples to illustrate the application of this factor.

(iv) The extent to which the entire project will be within the Army's jurisdiction. This factor is consistent with the requirement to determine the Army's control and responsibility for a proposed action. However, it does not adequately address the extent of the cumulative federal control and responsibility for the proposed action. CEQ is particularly concerned that the process of determining the scope of analysis help insure that the NEPA analysis is not inappropriately segmented. See *Sierra Club* v. *Marsh*, 769 F.2d 868 (1st Cir. 1985). Therefore, CEQ recommends development of an additional factor. The following language is offered as a suggestion. In its proposed revision ultimately reviewed by CEQ, the Army is free to adopt this language, to amend it, or to propose a substitute that addresses the determination of cumulative federal control and responsibility.

Suggested Language

(v) The extent of cumulative federal control and responsibility.

a. The district commander is further considered to have control and responsibility for portions of the project beyond the limits of Army Corps jurisdiction where the cumulative federal involvement of the Army Corps and other federal agencies is sufficient to grant legal control over such additional portions of the project. These are cases where the environmental consequences of the additional portions of the projects are essentially products of federal financing, assistance, direction, regulation, or approval (not including funding assistance solely in the form of general revenue sharing funds, with no federal agency control over the subsequent use of such funds, and not including judicial or administrative civil or criminal enforcement actions).[8]

b. In determining whether sufficient cumulative federal involvement exists to expand the scope of federal review, the district commander should consider whether other federal agencies are required to take federal action under the Fish and Wildlife Coordination Act (16 U.S.C. 661 *et seq.*), the National Historic Preservation Act of 1966 (16 U.S.C. 470 *et seq.*), the Endangered Species Act of 1973 (16 U.S.C. 1531 *et seq.*), Executive Order 11990, Protection of Wetlands, 42 U.S.C. 4321 (1977), and other environmental review laws and executive orders.

In recommending such a process, CEQ is not suggesting that the Army Corps of Engineers should be the lead agency in each of these cases. That would be determined as it is under current procedures implementing CEQ's lead agency regulations. Rather, CEQ is reiterating that the environmental review that is required for a proposed federal action which involves several federal actions should be conducted in a cohesive manner within the procedural framework of the NEPA process.

Additionally, CEQ recommends that the Army's procedures insure that the scope of analysis for analyzing impacts and alternatives in the NEPA process is the same as the scope of analysis for purposes of analyzing the benefits of a proposal. *See* 40 CFR 1502.23; *Sierra Club* v. *Sigler*, 695 F.2d 957 (5th Cir. 1983).

2. Purpose and Need

Abstract

CEQ finds that the proposed regulation is generally adequate, but recommends that additional language be inserted in the amendment to the effect that the agency must, in all cases, exercise independent judgment regarding the public purpose and need of the proposal.

The issue before us is how the purpose and need for a project is defined by the Army when preparing an EA or EIS for a federally permitted action.

The current Army procedures state that this section of the EIS:

> "shall briefly recognize that every application has both an applicant's purpose and need and a public purpose and need. These may be the same when the applicant is a governmental body or agency. In most instances when an EIS is required and the applicant is not a governmental body or agency, the applicant is a member of the private sector engaged in providing a good or service for profit. At the same time, the applicant is requesting a permit to perform work which, if approved, is considered in the public interest (i.e., provides a public benefit). This public benefit shall be stated in as broad, generic terms as possible. For instance, the need for a water intake structure requiring [an Army] Corps permit as part of a fossil fuel power plant shall be stated as the need for energy and not be limited to the need for cooling water. In a similar way, the need for housing near canals or near marinas, etc., shall be expressed as the need for shelter and not as the need for recreation near water." 33 CFR Part 230, Appendix B, Section 7i(b)(4).

The proposed Army regulation reads, in relevant part:

> "If the scope of analysis for the NEPA document . . . covers only the proposed specific activity requiring a Department of the Army permit, then the underlying purpose and need for that specific activity should be stated. (For example, 'The purpose and need for the pipe is to obtain cooling water from the river for the electric generating plant.') If the scope of the analysis covers a more extensive project, only part of which may require an Army permit, then the underlying purpose and need for the entire project should be stated. (For example, 'The purpose and need for the electric generating plant is to provide increased supplies of electricity to the (named) geographic area.') Normally, the applicant should be encouraged to provide a statement of his proposed activity's purpose and need from his perspective (for example, 'to construct an electric generating plant'). However, whenever the NEPA document's scope of analysis renders it appropriate, the [Army] Corps also should consider and express that activity's underlying purpose and need from a public interest perspective (to use that same example, 'to meet the public's need for electric energy')." 33 CFR Part 230, Appendix B, section 9b(4).

The CEQ regulation reads:

> "§ 1502.13 Purpose and need.
>
> "The statement shall briefly specify the underlying purpose and need to which the agency is responding in proposing the alternatives including the proposed action."

CEQ's regulation thus makes no distinction between a private and public "purpose and need". On the one hand, the very fact that a particular project requires the issuance of a federal permit necessarily implies a degree of federal review and responsibility from the public interest perspective. On the other hand, a reasonable evaluation of the proposed action and alternatives must include a thorough understanding of the applicant's purpose and need.

NEPA case law has interpreted this requirement to consider both public and private purpose and need. Courts have stressed the need to consider the objectives of the permit applicant. *Roosevelt Campobello International Park Comm'n. v. EPA*, 684 F.2d 1041 (1st Cir. 1982), but have also emphasized the requirement for the agency to exercise independent judgment as to the appropriate articulation of objective purpose and need. *City of Angoon v. Hodel*, 803 F.2d 1016 (9th Cir. 1986), *Petition for cert. filed*, 55 U.S.L.W. 3783 (U.S. April 10, 1987) (No. 86-1627). Courts have cautioned against blindly accepting only the applicant's statement of purpose and need, both for purposes of public interest review and for formulation of alternatives in the NEPA process. *Abenno v. Farnell*, 807 F.2d 633 (7th Cir. 1986).

The proposed regulation is an effort to achieve consideration of both the applicant's and the public's purpose and need by instructing the District Commander to normally focus on the applicant's purpose and need, as articulated by the applicant, but to consider and express the activity's purpose and need from a public interest perspective "whenever the NEPA document's scope of analysis renders it appropriate." CEQ finds that the proposed regulation is generally adequate and consistent with the proposed approach to the scope of analysis. CEQ recommends that additional language be added to the proposed regulation to the effect that the agency must, in all cases, exercise independent judgment regarding the objective purpose and need of the proposal.

3. Analysis of Alternatives in Environmental Assessments.

Abstract

There is no legal requirement to include a specific reference to "water dependent activities" under the Section 404(b)(1) guidelines in the Army's NEPA procedures. However, CEQ recommends that in the spirit of consistency with the CEQ regulations and as sound management policy, specifically to reduce duplication and paperwork and to increase efficient compliance with both NEPA and the Clean Water Act, the Army's procedures retain the requirement to integrate into the environmental impact analysis the alternatives to nonwater dependent activities under Section 404(b)(1).

The issue before us is the determination of when the Army must examine alternatives in an EA.

The current Army regulation reads:

> "a. Environmental Assessment (EA). The district engineer shall prepare an EA as soon as practicable after all relevant information has been made available to the district engineer (i.e., after the comment period for the public notice announcing receipt of the permit application has expired) and prior to preparation of the Findings of Fact (FOF). The EA shall include a discussion of reasonable alternatives. However, when the EA confirms that the impact of the applicant's proposal is not significant, there are no 'unresolved conflicts concerning alternative uses of available resources. . .' (Section 102(2)(E) of NEPA), and the proposed action is a water dependent activity, the EA need not include a discussion on alternatives to the proposal. In all other cases the EA must address all the alternatives that go before the ultimate decision maker. This discussion will include suggested means by which the environment might be protected and by which adverse impacts could be reduced by conditioning of the permit. The EA shall be a brief document (should not normally exceed 15 pages) primarily focusing on whether or not the entire project subject to the permit requirement could have significant effects on the environment but shall not be used to justify a decision. (For example, where a utility company is applying for a permit to construct an outfall pipe from a proposed power plant, the EA must assess the direct and indirect environmental effects and alternatives of the entire plant.) The EA shall conclude with a FONSI (See 40 C.F.R. 1508.13) or a determination that an EIS is required." 33 C.F.R. Part 230, Appendix B, Section 8(a).

The proposed Army regulation reads:

> "*EA/FONSI Document.* (See 40 C.F.R. 1508.9 and 1508.13 for definitions)
>
> "a. *Environmental Assessment (EA) and Findings of No Significant Impact (FONSI).* The district commander should complete an EA as soon as practicable after all relevant information is available (i.e., after the comment period for the public notice of the permit application has expired) and prior to completion of the statement of finding (SOF). The EA should normally be combined with other required documents (EA/404(b)(1)/SOF/FONSI). When the EA confirms that the impact of the applicant's proposal is not significant and there are no 'unresolved conflicts concerning alternative uses of available resources . . .' (section 102(2)(E) of NEPA), the EA need not include a discussion of alternatives. *Note:* The above rule would not preclude the district commander from considering alternatives not discussed in the EA during the course of the public interest review for the permit application if that would be appropriate. In all other cases where the district commander determines that there are unresolved conflicts concerning alternative uses of available resources, the EA shall include a discussion of the

reasonable alternatives which are to be considered by the ultimate decision-maker. The decision options available to the [Army] Corps, which embrace all of the applicant's alternatives, are issue the permit, issue with conditions, or deny the permit. 'Appropriate conditions' may include project modifications within the scope of established permit conditioning policy (See 33 CFR 325.4). The decision option to deny the permit results in the 'no action' alternative (i.e. no construction requiring an Army Corps permit). The combined document normally should not exceed 15 pages and shall conclude with FONSI (See 40 CFR 1508.13) or a determination that an EIS is required. The district commander may delegate the signing of a combined document. Should the EA demonstrate that an EIS is necessary, the district commander shall follow the procedures outlined in paragraph 8 of this appendix. In those cases where it is obvious an EIS is required, an EA is not required."

EPA objects to the deletion, in the proposed Army regulation, of the requirement that alternatives be evaluated in an EA if the proposal is not "water dependent" within the meaning of EPA's guidelines for section 404 permits under the Clean Water Act. The Army's argument for deleting this reference in the alternatives section is that neither NEPA nor the CEQ implementing regulations include any reference to "water dependency", and therefore, the Army NEPA regulations need not include such a reference. While this is literally a true statement, it does not reach the entire issue. The requirement to analyze alternatives which are not water dependent actions remains a requirement of the section 404 permit progam. Under Army's current procedural regulations, the section 404(b)(1) alternatives analysis is intertwined with the alternatives analysis in the NEPA process: in fact, the section 404(b)(1) guidelines themselves state that in most cases, NEPA documents will provide the information for the evaluation of alternatives under those guidelines. 40 CFR 230.10(4). Under those guidelines:

"(3) Where the activity associated with a discharge which is proposed for a special aquatic site . . . does not require access or proximity to or siting within the special aquatic site in question to fulfill its basic purpose (i.e., is not 'water dependent'), practicable alternatives that do not involve special aquatic sites are presumed to be available, unless clearly demonstrated otherwise. In addition, where a discharge is proposed for a special aquatic site, all practicable alternatives to the proposed discharge which do not involve a discharge into a special aquatic site are presumed to have less adverse impact on the aquatic ecosystem, unless clearly demonstrated otherwise.

"(4) For actions subject to NEPA, where the [Army] Corps of Engineers is the permitting agency, the analysis of alternatives required for NEPA environmental documents, including supplemental [Army] Corps NEPA documents, will in most cases provide the information for the evaluation of alternatives under these Guidelines . . . ." 40 CFR 230.10(a) (3) and (4).

CEQ's NEPA regulation, "Environmental review and consulation requirements," states:

"(a) To the fullest extent possible, agencies shall prepare draft environmental impact statements concurrently with and integrated with environmental impact analyses and related surveys and studies required by the Fish and Wildlife Coordination Act (16 U.S.C. 661 et seq.), the National Historic Preservation Act of 1966 (16 U.S.C. 470 et seq.), the Endangered Species Act of 1973 (16 U.S.C. 1531 et seq.), and other environmental review laws and executive orders." 40 CFR 1502.25(a).

Still another CEQ NEPA regulation entitled "Combining documents" states:

"Any environmental document in compliance with NEPA may be combined with any other agency document to reduce duplication and paperwork." 40 CFR 1506.4.

CEQ finds that there is no legal requirement to include a specific reference to "water dependent activities" under the section 404(b)(1) guidelines in the Army's NEPA procedures. However, CEQ recommends that in the spirit of consistency with the CEQ regulations and as sound management policy, specifically to reduce duplication and paperwork and to increase efficient compliance with both NEPA and the Clean Water Act, that the Army's procedures retain the requirement to integrate ito the environmental impact analysis the alternatives to non-water dependent activities under section 404(b)(1).

With respect to alternatives analysis in general, CEQ reiterates its earlier guidance that the alternatives to be analyzed must always be reasonable alternatives, " 'bounded by some notion of feasibility' to avoid NEPA from becoming 'an exercise in frivolous boilerplate.' " *Guidance Regarding NEPA Regulations*. Memorandum from Chairman A. Alan Hill to Heads of Federal Agencies, 48 FR 32463 (1983), quoting *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 551 (1978).

4. Page Limits on Environmental Impact Statements

Abstract

CEQ finds that the Army's proposed regulation to be premature in that the Army has not presented any evidence demonstrating that there has been a conscious effort to abide by the CEQ page limit recommendations. CEQ recommends that the Army attempt concerted compliance with the CEQ regulation before proposing a reduced page limit length.

The issue before us is the length of an EIS to insure adequate analysis of impacts and alternatives. The current Army regulations do not specify page limits for EIS(s).

The proposed Army regulations state that:

". . . a 50-page text would, in most cases, be adequate to discuss succinctly the relevant NEPA issues and to meet legal and technical requirements. To the extent practicable, and consistent with producing a legally and technically adequate EIS, district commanders will make all reasonable efforts to limit the text to a concise, readable length of 50 pages." 33 CFR 230.13.

The CEQ regulations state that the text of final EISs should normally be less than 150 pages and for proposals of unusual scope or complexity, should normally be less than 300 pages. 40 CFR 1502.7.

CEQ finds the Army's proposed regulation to be premature in that the Army has not presented any evidence demonstrating that there has been a conscious effort to abide by the CEQ page limit recommendations. CEQ recommends that the Army attempt concerted compliance with the CEQ regulation before proposing a reduced page limit length.

Dated: June 8, 1987.

A. Alan Hill,
Chairman.

William L. Mills,
Member.

Jacqueline E. Schafer,
Member.

Footnotes

1. Under the CEQ referral regulations, if the lead agency requests more time and gives assurances that the matter will not go forward in the interim, the Council may grant an extension. 40 CFR 1504.3(d). Under this provision CEQ granted the Army nine extensions of time, in the period from February 25, 1985, to April 18, 1986.

2. The CEQ referral regulations provide that the Council may, (among other options), "[d]etermine that the issue should be further negotiated by the referring and lead agencies and is not appropriate for Council consideration until one or more heads of agencies reports to the Council that the agencies' disagreements are irreconcilable." 40 CFR 1504.3(f)(5). The referral was returned to EPA and the Army under this provision.

3. CEQ received 57 written comments during this period.

4. In 1980, the Army Corps of Engineers filed a total of 35 EISs on regulatory actions. In 1981, that number dropped to 19. Subsequent filings for regulatory EISs are 1982—27; 1983—13; 1984—20; 1985—15; 1986—20.

5. In *Colorado River Indian Tribes v. Marsh*, 605 F. Supp. 1425 (C.D. Cal. 1985), the district court did discuss, and express disagreement with, the decision in *Save the Bay, Inc. v. Corps of Engineers* and *Winnebago Tribe of Nebraska v. Ray*, to the extent that it perceived that these decisions distinguished between "major federal action" and "significantly" as separate triggers under NEPA. The CEQ regulations, however, state that "[m]ajor reinforces but does not have a meaning independent of significantly". 40 CFR 1508.18. Neither *Save the Bay* nor *Winnebago* discussed this rule, and the Army does not challenge this rule.

In any event, the court in *Colorado River Indian Tribes* did find that an EIS was required prior to issuance of an Army permit for placement of *riprap* for stabilization of shore banks on the site of a proposed residential and commercial development. The court rested its holding on an agency's responsibility under NEPA to assess the direct, indirect and cummulative effects of a proposed action. In that case, the court determined that the Army had improperly limited its analysis to the direct effects of the Army permit.

The scope of analysis issue addresses the extent to which the proposed action is identified as a federal action for purposes of compliance with NEPA. Modification of the regulation addressing scope of analysis does not affect the requirement to evaluate impacts. Once the scope of analysis is determined, the agency must then assess the direct, indirect and cumulative effects of the proposed federal action. *See* 40 CFR 1502.16, 1508.7, and 1508.8.

6. *Winnebago Tribe of Nebraska v. Ray*, 621 F.2d 269 (8th Cir.), *cert. denied*, 449 U.S. 836 (1980).

7. To the extent that this factor rests on the holding in *Save the Bay v. Corps of Engineers*, it should be noted that the Court of Appeals did *not* hold that the subject federal action must be a condition precedent to private action in order for preparation of an EIS to be required. Rather, the court found that the overall *federal* involvement in the proposed action was insufficient to "federalize" the entire project.

8. *See* 40 CFR 1508.18 (definition of "major federal action").

[FR Doc. 87-13403 Filed 6-11-87; 8:45 am]

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TESTIMONY

of

Richard F. Bechtel
Federal-State Coordinator For Montana

Hearing on Management of the National Environmental Policy Act
Before the Hazardous Waste and Toxic Substances Subcommittee
of the
Senate Committee on Environment and Public Works
November 24, 1987

The State of Montana supports S.1792 and the concepts embodied in the bill. We have always been troubled with the failure of the Federal Energy Regulatory Commission (FERC) to adopt the Council on Environmental Quality (CEQ) regulations implementing the National Environmental Policy Act (NEPA). We support the proposal to require FERC to comply with NEPA as other federal agencies do. We also support reversing FERC's administrative decision to retroactively apply a rule on 401 certification under the Clean Water Act.

NEPA Compliance

There is no compelling justification for FERC to be out of step with the rest of the federal government in complying with the CEQ's NEPA rules. These rules provide all federal agencies with uniform requirements for assessing environmental impacts and for allowing the public to participate in federal decisions that have environmental implications. FERC hydropower licensing decisions significantly affect the environment in many places throughout the United States. The people concerned with the environmental effects of a project should be entitled to participate in FERC's environmental review process as they would be under a similar process in any other federal agency. FERC decisions also affect the implementation of environmental regulatory statutes and functions by state government. FERC has not used the NEPA provision for coordinating the environmental analyses of state governments with those of the federal government. This is unfortunate because the states are familiar with the NEPA process and are comfortable operating under it.

S.1792 would require FERC to comply with the uniform NEPA rules. Such compliance would make FERC's environmental review process consistent with that of other federal agencies. Even more important from the perspective of Montana and the other states, FERC would have to comply with section 1506.2 of the uniform NEPA rules. This section requires federal agencies to cooperate with state agencies to the fullest extent possible to reduce duplication between NEPA and state requirements. A coordinated process of this type would include the holding of joint public meetings on environmental impacts and coordination of state and federal time frames for review processes. The ultimate goal should be joint state-federal environmental impact statements or assessments, with FERC staff and state agency personnel working together on the same document.

This type of cooperation is nothing new for federal agencies and is working especially well in Montana. Cooperating agencies have seen merit in state-federal cooperation and coordination. Montana has done joint environmental impact statements with the Forest Service, the Department of Interior, the Bureau of Land Management, and even the federal power marketing agencies, Bonneville Power Administration and Western Area Power Administration. We have been very satisfied with such processes and know the federal agencies have also been pleased. In fact, many of these agencies have negotiated written agreements with the state of Montana for such joint reviews. I might add that these joint efforts take place even in the instances where there is jurisdictional disagreement between the federal agency and the State.

Complying with the section 1506.2 requirement will not eliminate the problems relating to states' water rights and state energy facility siting in the FERC hydropower licensing decisions that the First Iowa decision created. These problems still need to be resolved. However, compliance with Section 1506.2 would be a major step in making FERC more responsive to local issues and concerns.

401 Certification

Section 401 of the Federal Clean Water Act provides that any applicant for a federal permit or license for any activity that may cause a discharge of pollution into navigable waters must obtain certification from the affected state that the activity will not cause violations of state water quality standards. Section 401 also provides that:

> "If the state...fails or refuses to act on a request for certification, within a reasonable period of time (which shall not exceed one year) after receipt of such request, the certification requirements of this subsection shall be waived..." (33 U.S.C. 1251 et. seq.).

Prior to February 1987, FERC considered the one-year certification review period to begin when the applicant had provided the certifying agency with a correct and complete application containing all information and data necessary to evaluate the water quality effects of the proposed project. Thus the State of Montana had one year to evaluate the water quality effects of a project and to work with the applicant to prevent violations of water quality standards. This one year certification period also allowed enough time for adequate public notice and review in most cases because the state had all the information it needed to review the application.

In February 1987, FERC modified its policy so that it considered the one-year period to commence on the date that the applicant requested certification from the state. (Order NO. 464 52 FR 5446). FERC has not said what form this request should take but at least to this point it requires a written request--a telephone call won't do--yet.

The problem with the change is that some applications have consisted of little more than the applicant's name and the location of the proposed hydro facility. There is not sufficient information even to begin processing the application. Still under FERC's new rule, the state has one year from the date the certification request is made to obtain the necessary information and data to make the application complete, evaluate the completed application, allow public review and approve or deny the application. This may not be enough time if the application is incomplete and considerable information must still be collected. In fact, FERC's decision to apply its new interpretation retroactively (correspondence of April 11, 1987) resulted in the waiver of state 401 certification for eight projects in Montana.

S.1792 as proposed would allow us to proceed with the 401 certification process for these projects. Modifying this legislation to require that the one-year period commences after the certifying agency receives a correct and complete application would enable Montana to complete 401 certification for most new FERC applications in Montana within the year allotted.

However, it is important to note that even if the legislation is adopted as written, the State of Montana, and probably other states, are still faced with a problem certifying some applications under section 401. The problem has to do with competing applicants or other parties appealing the decision made by the state certifying agency. Unfortunately this appeal process is beyond the control of the state. Even if the state has no problem completing its 401 certification work in one year, it cannot deny parties their due process of appeal.

These appeals can substantially extend the 401 process. We have a case in Montana (Tiber Dam) where the appeal process on a 401 certification started in 1984 and is still continuing. This happened despite the state completing its certification process within the one year after correct and complete applications were submitted.

As it now stands, FERC and a project applicant are entitled to proceed with a project as if it was certified one year after applying for certification, even if a party objects to and appeals a 401 certification issued by the state. Only by denying the 401 certification request can the state ensure that the appeal process can be carried out without risking a lapse of the one-year period.

The State of Montana strongly supports S.1792 with the one suggested amendment.

TESTIMONY OF THE
NATIONAL HYDROPOWER ASSOCIATION
BEFORE THE
UNITED STATES SENATE
COMMITTEE ON THE ENVIRONMENT AND PUBLIC WORKS
NOVEMBER 24, 1987

My name is Gail Ann Greely. I am a Senior Consultant with Henwood Energy Services, Inc. of Sacramento, California and a member of the California Bar. I have worked almost exclusively on hydroelectric licensing, relicensing and license compliance for over five years. I am here today on behalf of the National Hydropower Association to testify on Senate Bill 1792 and, in particular, to oppose Section 104, which would reverse the application to pending projects of Federal Energy Regulatory Commission Order 464 defining the time limit for state agency certification of water quality conformance under the Clean Water Act.

The National Hydropower Association is a non-profit organization founded in 1983 to fill the need for a national voice for the hydropower industry. Its Board of Directors and members include hydro developers, owners and operators, manufacturers, and engineers, as well as legal, financial, and consulting firms from all regions of the country. NHA supports the common concerns of the hydropower industry in maintaining the viability of hydropower as a low cost, reliable source of renewable energy. In the past few years, NHA has focussed much of its attention on the increasing burden of government regulation at the federal, state and local levels that threatens to reduce this nation's current hydropower resource and block responsible development of remaining potential. It is this concern that brings us before you today.

Section 104 of Senate Bill 1792 would reverse a decision of the Federal Energy Regulatory Commission in February of this year to apply its new rule on time limitations for state water quality certification to all pending and prospective hydroelectric applications. The bill provides state water quality agencies a year from enactment to certify that nearly 200 proposed and existing federally-licensed hydroelectric projects conform to water quality standards. It is NHA's view that application of the F.E.R.C.'s rule to pending projects was entirely appropriate and that extending the time for state action on these projects is unfair to the project applicants and inconsistent with responsible administration of the Federal Power Act as amended last October by the Electric Consumers Protection Act.

APPLICATION OF THE RULEMAKING TO PENDING PROJECTS WAS PERMISSIBLE AND APPROPRIATE

Under the federal Clean Water Act, authority can be delegated to state agencies to determine if federally-permitted projects will conform with applicable water quality standards. In the context of F.E.R.C. hydropower licensing, this means an applicant must obtain a Section 401 certificate from the appropriate state agency before F.E.R.C. can issue a license for the project. However, the Clean Water Act limits the time available to the states to evaluate water quality conformance to prevent unnecessary delays in the federal permitting process. Section 401(a)(1) states:

> If the State, interstate agency, or Administrator, as the case may be, fails or refuses to act on a request for certification, within a reasonable period of time (which shall not exceed one year) after receipt of such request, the certification requirements of this subsection shall be waived with respect to such Federal application.

The clock starts when the request is received. The F.E.R.C. first looked at the question of when the request is received in the Washington County Hydro Development Associates case (928 FERC P61,341) decided in September of 1984. In that case, the F.E.R.C. decided that the one-year period began when the request was found acceptable for processing by the state agency. However, less than one year later the F.E.R.C. was sufficiently concerned with the possibility of intentional delay by the state agencies to initiate a rulemaking to reexamine the policy expressed in Washington County.

The Notice of Proposed Rulemaking in Docket No. 85-6, issued August 6, 1985, suggested two alternatives for "starting the clock" -- neither one dependent on a state agency determination of "acceptability." Sixty days were allowed for comment on the proposed rule and comments were received from 29 entities, including numerous federal and state agencies. The final rule, consistent with the plain language of the Clean Water Act, started the one year time limit from the date of actual receipt of the request. For those projects for which one year had already passed from date of receipt, the F.E.R.C. applied the rule retroactively, but provided additional time for state agencies to bring any water quality concerns to the F.E.R.C's attention.

Application of legislation or an administrative rule to pending cases is neither impermissible nor unusual. The Electric Consumers Protection Act of last October contains several instances of retroactivity, including some in which special treatment is accorded the affected projects. The federal courts have often been faced with challenges to retroactive application, and have developed a general standard of fairness for assessing them. As the Supreme Court put it in S.E.C. v. Chenery (332 U.S. 194, 203 (1947):

> ...[R]etroactivity must be balanced against the mischief of producing a result which is contrary to a statutory design or to legal and equitable principles. If that mischief is greater than the ill effect of the retroactive application of a new standard, it is not the type of retroactivity which is condemned by law.

That test is fully satisfied by the circumstances surrounding the F.E.R.C.'s retroactive application of Order 464. No "mischief" is done to the affected state agencies or the protection of water quality by retroactive application of this rule. The Washington County policy was in effect for less than one year before the F.E.R.C.'s concern with state abuses prompted a Notice of Proposed Rulemaking. The state agencies had full notice of the proposed rule, had a lengthy opportunity to provide comment, and an opportunity to seek rehearing once the final rule was issued. During the 18 months that the rulemaking was pending, the state agencies were on notice that their freedom to delay water quality certification could come to an end. They could have acted on the pending requests for certification during that period. They could also have provided comments on pending projects even after the final rule was issued. The rule specifically required the Office of Hydropower Licensing to solicit comments on the pending projects from the affected state agencies. This it did in April of this year, stating that it would not act on any of the pending license applications until after an additional 30 day comment period.

For all of the pending projects for which water quality certification was waived by application of Order 464, the state agencies had full notice of possible limitations on their ability to further delay. They had already had the full one year provided in the Clean Water Act to act on the certification requests when Order 464 became effective and were specifically allowed yet another 30 days by the rule. The state agencies have had ample opportunity to raise substantive water quality issues on all of these pending projects and have known from the beginning that their time to do so was limited.

APPLICATION OF THE RULEMAKING TO PENDING PROJECTS WILL NOT DAMAGE THE ENVIRONMENT

Application of Order 464 to pending projects was entirely fair to the state agencies charged with administration of Section 401 water quality certification. It was also fair to the environment. The failure of these state agencies to provide the F.E.R.C. with a certificate of water quality conformance on these projects does not mean that water quality will be unprotected. The F.E.R.C made clear in its order that any comments of the state agencies on these projects would receive full consideration. In addition, the F.E.R.C. has an independent obligation to review water quality under its own regulations, the F.P.A. and N.E.P.A. For years the F.E.R.C. has required extensive water quality data to be submitted by project applicants and has included water quality issues in its Environmental Assessments and Environmental Impact Reports. The fact that water quality will be fully protected under the new rule is demonstrated by the license order for the Brassua Project (#2615) in Maine. Although the state agency had waived water quality certification by failing to act, the F.E.R.C. nonetheless included all of the water quality conditions recommended by the state agency. If state agencies are truly concerned about substantive water quality issues for these pending projects, they simply need to inform the F.E.R.C. of their concerns as stated in Order 464.

ALLOWING ANOTHER YEAR OF DELAY WILL DAMAGE PROJECT APPLICANTS

Section 104 of S. 1792 is not necessary to protect state agencies from an unfair rule. It is not needed to protect water quality. All it does is add a year from date of enactment to the delay already experienced by the applicants for over 190 pending projects. For those projects it has now been well over a year since they first requested certification of compliance with water quality standards. For many, it has been over 5 years. These applicants are entitled to prompt action on their requests from the states and prompt action on their license applications from the F.E.R.C. They are not getting it, and it is costing them time and money, and may result in the loss of their entire investment in project development. For relicensing of existing projects, the processing costs mount with the loss of the ability to intelligently plan, schedule and budget project activities and expenditures. These applicants have acted diligently in reliance on the law. Fairness demands that their requests for licenses no longer be held hostage to the unwillingness of state agencies to respond.

UNJUSTIFIED DELAY UNDERMINES THE ADMINISTRATIVE PROCESS AND THE INTENT OF CONGRESS IN THE CLEAN WATER ACT AND THE ELECTRIC CONSUMERS PROTECTION ACT OF 1986

Sound administration of the hydroelectric licensing process also suffers as a result of S. 1792's unnecessary delay. Allowing additional time for state processing of these pending projects creates an automatic backlog for an agency already facing a substantial burden of pending projects. Included in the list of projects that would be delayed by this bill are 4 of the 9 relicensings that Congress specifically identified for expeditious action in the Electric Consumers Act. It undermines the intent of Congress in the Clean Water Act to require state action within one year. But far more serious than that is the power it gives to the state agencies to prevent the kind of comprehensive resource balancing at the federal level that Congress worked so hard to achieve through the E.C.P.A.

Some state agencies have been consciously using the leverage of delay to force license applicants to agree to project conditions that extend far beyond a determination of conformance to water quality standards. They are denying certification on some projects solely to avoid or forestall federal licensing action and the balancing of public interests it requires. Conditions pertaining to recreation, dam safety, fishery habitat, aesthetics and endangered species have been included within the scope of some water quality certificates. These are matters that Congress clearly intended to be a part of the F.E.R.C.'s exclusive responsibility under Section 10(a) of the Federal Power Act to judge what constitutes "... the project... best adapted to a comprehensive plan for improving or developing a waterway... for the improvement and utilization of water power development, for the adequate protection, mitigation, and enhancement of fish and widlife (including related spawning grounds and habitat), and for other beneficial public uses, including irrigation, flood control, water supply, and recreational and other purposes...." Permitting more delay for these pending projects further undermines federal authority.

CONGRESSIONAL ACTION IS NOT REQUIRED TO FORCE THE F.E.R.C. TO ADOPT THE CEQ NEPA REGULATIONS

The other issue addressed in S. 1792 is also unnecessary. The F.E.R.C. has for many years satisfied its NEPA obligation through regulations that were as good, or perhaps better, than the Council on Environmental Quality NEPA regulations. The F.E.R.C.'s obligation under the Federal Power Act has always included environmental review as well as economic feasibility, engineering standards and safety. In its regulations, it has attempted to develop an efficient and effective way to meet all of those obligations. Though we believe F.E.R.C. has fully met its NEPA obligation through application of its current regulations, it is now proposing to adopt the CEQ regulations and issued a Notice of Proposed Rulemaking to solicit public comment on June 11, 1987. No legislation is necessary. The F.E.R.C. is taking the required steps toward adoption of the CEQ regulations.

RESPONSIBLE ADMINISTRATION OF HYDROELECTRIC DEVELOPMENT IS IN THE NATIONAL INTEREST AND IT IS NOT SERVED BY S. 1792

It is in the best interests of this nation to protect its existing renewable energy resources and to develop new environmentally responsible projects. Hydropower is this nation's best source of renewable energy, but the hydropower industry is being manacled by an increasingly lengthy and costly administrative process that achieves nothing for the environment. The National Hydropower Association urges this Committee to resist adding yet another layer of complexity and jurisdictional conflict to the nearly 200 pending projects affected by this bill. Water quality will not suffer if state certification is waived. But this nation's energy policy will, if it is not.

TESTIMONY OF LANGDON MARSH

EXECUTIVE DEPUTY COMMISSIONER
NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION
BEFORE THE
UNITED STATES SENATE SUBCOMMITTEE ON HAZARDOUS WASTES
AND TOXIC SUBSTANCES

NOVEMBER 24, 1987

GOOD MORNING, MY NAME IS LANGDON MARSH AND I SERVE AS EXECUTIVE DEPUTY COMMISSIONER FOR THE NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION. I WOULD LIKE TO THANK THE SUBCOMMITTEE FOR THIS OPPORTUNITY TO TESTIFY ON SENATE BILL 1792 AND ITS IMPLICATIONS FOR THE STATE OF NEW YORK.

MY TESTIMONY WILL FOCUS ON SECTION 104 OF THE BILL REGARDING THE ISSUANCE OF WATER QUALITY CERTIFICATES PURSUANT TO SECTION 401 OF THE CLEAN WATER ACT FOR HYDROELECTRIC POWER PROJECTS. THE DEPARTMENT STRONGLY SUPPORTS THIS SECTION AND GENERALLY SUPPORTS THE ENTIRE MEASURE.

THERE HAVE BEEN RECENT DEVELOPMENTS IN THE HYDROPOWER ARENA THAT HAVE A MAJOR IMPACT UPON THE DEPARTMENT'S ROLE IN THE FEDERAL REVIEW AND APPROVAL PROCESS. OF PRIMARY CONCERN IS THE FEDERAL ENERGY REGULATORY COMMISSION (FERC) ORDER WHICH SENATE BILL 1792 PROPOSES TO COUNTERMAND. IN ORDER 464, FERC HAS CHANGED THE RULE AS TO WHEN THE ONE YEAR REVIEW PERIOD COMMENCES WITHIN WHICH THE STATE MUST TAKE ACTION ON WATER QUALITY CERTIFICATION APPLICATIONS UNDER THE CLEAN WATER ACT.

SECTION 401 OF THE CLEAN WATER ACT AS IT APPLIES TO HYDROELECTRIC PROJECTS, PROHIBITS FERC FROM AUTHORIZING THE CONSTRUCTION OR OPERATION OF A NEW PROJECT UNLESS THE PROJECT DEVELOPER HAS OBTAINED CERTIFICATION FROM THE STATE THAT ANY DISCHARGE WILL COMPLY WITH STATE AND FEDERAL WATER QUALITY STANDARDS. IF SECTION 401 WATER QUALITY CERTIFICATION IS DENIED BY THE STATE CERTIFYING AGENCY, NO FEDERAL AGENCY MAY AUTHORIZE ANY ACTION THAT MAY RESULT IN A DISCHARGE. HOWEVER, THE CLEAN WATER ACT DOES PERMIT FERC TO AUTHORIZE A HYDROELECTRIC LICENSE WITHOUT SECTION 401 CERTIFICATION, IF THE STATE AGENCY HAS FAILED TO ACT ON THE APPLICANT'S REQUEST FOR 401 CERTIFICATION WITHIN A REASONABLE PERIOD OF TIME, NOT TO EXCEED ONE YEAR. IN THIS EVENT, CERTIFICATION IS DEEMED WAIVED.

THE KEY TO THE PRESENT CONFLICT BETWEEN FERC AND THE DEPARTMENT CENTERS UPON THE ONE YEAR WITHIN WHICH THE DEPARTMENT MAY REVIEW A 401 WATER QUALITY CERTIFICATE REQUEST. IN THE PAST, THE POINT WHEN THE ONE YEAR CLOCK COMMENCED HAD BEEN INTERPRETED BY FERC TO BE WHEN A COMPLETE APPLICATION IS SUBMITTED TO THE REVIEWING AGENCY WITH "COMPLETENESS" BEING A DETERMINATION MADE BY THE STATE. THE ONE YEAR STARTED ONLY WHEN THE DEPARTMENT FOUND THE 401 WATER QUALITY CERTIFICATION REQUEST ACCEPTABLE FOR PROCESSING. THE WATER QUALITY CERTIFICATION PROCESS PROCEEDS SIMULTANEOUSLY WITH THE FEDERAL LICENSING CONSULTATION PROCESS. IN MOST CASES THE CERTIFICATION REQUEST IS RECEIVED BY THE DEPARTMENT EARLY IN THIS PROCESS, PRIOR TO THE DEVELOPMENT AND SUBMISSION OF THE TECHNICAL STUDIES REQUIRED BY THE DEPARTMENT TO FACILITATE INFORMAL DECISIONMAKING. THUS, IT IS CRUCIAL TO DETERMINE WHEN THE ONE-YEAR PERIOD IS TRIGGERED, AND WHY COMMENCEMENT BASED UPON A COMPLETE APPLICATION ACCEPTABLE FOR PROCESSING IS PREFERRED. THIS INTERPRETATION WAS EXPRESSLY ADOPTED BY FERC IN ITS WASHINGTON COUNTY HYDRO DEVELOPMENT ASSOCIATES ORDER, ISSUED IN 1984.

IN AUGUST OF 1985 FERC ISSUED A NOTICE OF PROPOSED RULEMAKING TO RE-EXAMINE THE PROCEDURES FOR DETERMINING WHEN 401 CERTIFICATION IS DEEMED WAIVED BY THE CERTIFYING AGENCY. AT THAT TIME FERC PROPOSED TO START THE WAIVER PERIOD AS OF THE DATE THE CERTIFYING AGENCY RECEIVED THE 401 CERTIFICATION REQUEST, RATHER THAN WHEN THE CERTIFYING AGENCY FOUND THE REQUEST ACCEPTABLE FOR PROCESSING. IN ADDITION, FERC PROPOSED TO SHORTEN THE PERIOD IN WHICH THE CERTIFYING AGENCY HAD TO REVIEW THE APPLICATION FROM ONE YEAR TO 90 DAYS.

THE NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION COMMENTED ON THE PROPOSED RULE AS DID 28 OTHER STATE AGENCIES, CITIZEN GROUPS, AND UTILITIES. WE HAVE SUBMITTED A COPY OF OUR COMMENTS TO THE COMMITTEE. ON FEBRUARY 11, 1987, FERC ISSUED ORDER 464, WHICH SET FORTH ITS FINAL RULE REGARDING 401 CERTIFICATION. IN ITS RULEMAKING, FERC ABANDONED ITS ATTEMPT TO SHORTEN THE REVIEW PERIOD TO 90 DAYS, IN PART BECAUSE OF THE OVERWHELMING OPPOSITION OF THE COMMENTING ORGANIZATIONS. HOWEVER, FERC REINTERPRETED THE COMMENCEMENT OF THE WAIVER PERIOD TO OCCUR ON THE DATE OF RECEIPT OF A CERTIFICATION REQUEST. FERC REASONED THAT THE STATES WOULD RECEIVE MUCH, IF NOT MOST, OF THE INFORMATION DURING THE CONSULTATION PROCESS FOR THEIR ACTION ON A 401 CERTIFICATION REQUEST. THIS CHANGE BECAME EFFECTIVE MAY 11, 1987, FOR ALL HYDROELECTRIC APPLICATIONS FILED AFTER THE EFFECTIVE DATE.

THE FEASIBILITY OF THE REINTERPRETATION OF THE COMMENCEMENT OF THE ONE-YEAR PERIOD WILL DEPEND SOLELY UPON PROJECT APPLICANTS. THE BURDEN IS ON THEM TO INSURE THAT ADEQUATE INFORMATION TO ASSESS WATER QUALITY AND ASSOCIATED ENVIRONMENTAL IMPACTS WILL BE PROVIDED TO THE DEPARTMENT PRIOR TO FILING FOR WATER QUALITY CERTIFICATION. IF ADEQUATE INFORMATION HAS NOT BEEN PROVIDED, OR IS NOT FORTHCOMING EARLY IN THE ONE-YEAR REVIEW PERIOD, THE APPLICATION WILL BE DENIED, WITHOUT PREJUDICE. ADEQUATE INFORMATION MUST NOW BE PROVIDED WITHIN SIX MONTHS OF FILING FOR CERTIFICATION, TO ASSURE SUFFICIENT TIME FOR REVIEW OF THE "COMPLETE" APPLICATION BY THE DEPARTMENT. ALTHOUGH WE ARE

NOT HAPPY WITH FERC'S ACTION AS IT APPLIES PROSPECTIVELY, THE DEPARTMENT CAN STILL MEET ITS OBLIGATION UNDER THE CLEAN WATER ACT, IF THE APPLICANT IS FORTHCOMING WITH THE REQUIRED INFORMATION.

BURIED IN THE DISCUSSION SECTION OF THE FINAL RULEMAKING UNDER MISCELLANEOUS MATTERS, FERC STATES THAT WITH REGARD TO PENDING LICENSING APPLICATIONS WHICH DO NOT YET HAVE SECTION 401 CERTIFICATION, THE COMMISSION WILL DEEM CERTIFICATION TO BE WAIVED ONE YEAR AFTER THE DATE THE CERTIFYING AGENCY RECEIVED THE CERTIFICATION REQUEST. THUS, FERC RETROACTIVELY IMPOSED ITS NEW CALCULATION OF THE ONE YEAR WAIVER PERIOD.

IN APRIL OF 1987, THE DEPARTMENT WAS NOTIFIED BY FERC THAT 23 PROJECTS IN NEW YORK WERE AFFECTED BY THE RETROACTIVE APPLICATION OF ORDER 464. WE HAVE SUBMITTED A LIST OF THESE PROJECTS TO THE COMMITTEE. IN REVIEWING OUR FILES, WE DETERMINED THAT WATER QUALITY CERTIFICATES HAD ALREADY BEEN ISSUED WITH CONDITIONS, FOR FOUR OF THE LISTED PROJECTS. IN ADDITION, WE DETERMINED THAT CERTIFICATION HAD BEEN DENIED FOR THREE OF THE LISTED PROJECTS. UPON RAISING THESE CASES WITH FERC, WE LEARNED THAT FERC WAS INTERPRETING ORDER 464 TO APPLY TO ALL HYDROPOWER PROJECTS, INCLUDING THOSE WHERE CERTIFICATION HAD BEEN DENIED OR ISSUED PRIOR TO THE EFFECTIVE DATE OF ORDER 464, BUT WHERE THE STATE DID NOT ACT WITHIN ONE YEAR OF RECEIPT OF THE WATER QUALITY CERTIFICATION REQUEST. THUS, THREE PROJECTS THAT HAD ESSENTIALLY BEEN PRECLUDED FROM DEVELOPMENT BASED UPON THEIR NEGATIVE IMPACT

ON WATER QUALITY SUDDENLY BECAME VIABLE PROJECTS. FURTHER, FOUR PROJECTS THAT HAD BEEN APPROVED BUT WITH SUBSTANTIAL CONDITIONS WERE NOW PERMITTED TO PROCEED WITHOUT COMPLYING WITH THE SUBSTANTIVE REQUIREMENTS IMPOSED BY THE DEPARTMENT. NOT ONLY HAS FERC PRECLUDED THE DEPARTMENT FROM ISSUING WATER QUALITY CERTIFICATES FOR PROJECTS WHERE THE CERTIFICATES HAD BEEN PENDING FOR MORE THAN ONE YEAR, IT HAS ARBITRARILY VOIDED ACTIONS TAKEN BY THE DEPARTMENT REGARDING SEVEN PROJECTS THAT HAD BEEN CONSISTENT WITH THE ARTICULATED FERC INTERPRETATION IN EFFECT AT THE TIME THE DEPARTMENT ACTED ON THESE PRIOR REQUESTS.

THIS ABROGATION OF THE STATE'S AUTHORITY TO ISSUE WATER QUALITY CERTIFICATES CANNOT BE TOLERATED. THE DEPARTMENT DEVOTES CONSIDERABLE TIME, ENERGY AND RESOURCES TO REVIEWING HYDROPOWER PROJECTS. THE APPLICATION FOR A WATER QUALITY CERTIFICATE TRIGGERS THE IMPLEMENTATION OF A COMPREHENSIVE ENVIRONMENTAL REVIEW UNDER THE STATE'S ENVIRONMENTAL QUALITY REVIEW ACT. IT IS POSSIBLE THAT THE DEPARTMENT WOULD REQUIRE THE PREPARATION OF AN ENVIRONMENTAL IMPACT STATEMENT AND A PUBLIC HEARING UNDER THE STATE EQUIVALENT OF THE NATIONAL ENVIRONMENTAL POLICY ACT. THE USE OF THIS COMPREHENSIVE ENVIRONMENTAL REVIEW HAS BECOME MORE POPULAR IN THE RECENT PAST, BOTH WITH DEVELOPERS AND PUBLIC INTEREST GROUPS. BY DENYING THE STATE THE RIGHT TO ISSUE WATER QUALITY CERTIFICATES FOR THE PENDING PROJECTS, FERC IS ALSO ELIMINATING THE STATE'S RIGHT TO UNDERTAKE THIS VITAL COMPREHENSIVE ENVIRONMENTAL REVIEW.

THE DEPARTMENT FIRST BECAME AWARE OF FERC'S ACTION REGARDING PENDING WATER QUALITY CERTIFICATION REQUESTS IN APRIL 1986. AT THAT TIME, WE FILED A PETITION WITH FERC REQUESTING THAT THE COMMISSION RECONSIDER THE RETROACTIVE APPLICATION OF ITS ACTION TAKEN IN ORDER 464. A COPY OF THIS PETITION HAS BEEN PROVIDED FOR YOUR REVIEW. FERC HAS NOT YET ACTED ON OUR REQUEST. TO DATE, FERC HAS ISSUED LICENSES FOR TWO OF THE TWENTY-THREE PROJECTS AFFECTED BY THE RETROACTIVE APPLICATION OF ORDER 464. IN BOTH CASES, THE DEPARTMENT HAD NOT ACTED WITHIN ONE YEAR AFTER RECEIPT OF THE CERTIFICATION REQUEST. IN BOTH CASES, FERC IGNORED THE DEPARTMENT'S WATER QUALITY CONCERNS. IN AN ATTEMPT TO GET FERC TO CONSIDER OUR CONCERNS, THE DEPARTMENT FILED ADMINISTRATIVE PETITIONS SEEKING REVIEW OF THE LICENSES. WE SUBSEQUENTLY INSTITUTED FORMAL JUDICIAL PROCEEDINGS IN THE UNITED STATES COURT OF APPEALS. THE DEPARTMENT HAS ALSO FILED FOR PARTY STATUS IN ALL OF THE LICENSE PROCEEDINGS FOR THE TWENTY-THREE AFFECTED PROJECTS.

AFTER FILING OUR TWO PETITIONS IN FEDERAL COURT WE WERE ADVISED BY FERC STAFF THAT, IN BOTH CASES, FERC HAD RESPONDED TO OUR ADMINISTRATIVE PETITION BY ISSUING A "TOLLING" ORDER, STOPPING FURTHER ACTION ON THE LICENSING PROCEEDINGS. TO DATE NEITHER TOLLING ORDER HAS BEEN RECEIVED BY THE DEPARTMENT. IF WE HAD BEEN NOTIFIED THAT FERC HAD ISSUED A TOLLING ORDER WE WOULD NOT HAVE EXPENDED THE TIME, ENERGY, AND EXPENSE OF COMMENCING FORMAL ADJUDICATORY PROCEEDINGS. IT IS INCOMPREHENSIBLE THAT FERC WOULD TAKE ACTION THAT DIRECTLY AFFECTS A STATE AGENCY

WITHOUT NOTIFYING THAT AGENCY.

THE ENACTMENT OF SENATE BILL 1792, SPECIFICALLY SECTION 104, WILL ELIMINATE THE DEPARTMENT'S NEED TO INSTITUTE FURTHER COURT PROCEEDINGS AND WILL RENDER THE CURRENT COURT PROCEEDINGS MOOT. SECTION 104 ADDRESSES THE VERY ISSUE THAT THE DEPARTMENT HAS RAISED IN THE ADMINISTRATIVE AND JUDICIAL CONTEXT: THAT THE RETROACTIVE NATURE OF ORDER 464 REPRESENTS AN ARBITRARY ABROGATION OF THE STATE'S AUTHORITY THAT SHOULD, IN SOME MANNER, BE REVERSED. IF ENACTED, SECTION 104 OF SENATE BILL 1792 WOULD PROVIDE THE DEPARTMENT WITH AN ADDITIONAL YEAR WITHIN WHICH TO ACT UPON THE WATER QUALITY CERTIFICATION REQUESTS FOR THE 23 PROJECTS AFFECTED BY THE RETROACTIVITY OF ORDER 464. WE FULLY SUPPORT THIS INITIATIVE AND APPLAUD YOUR INTEREST IN ADDRESSING THIS IMPORTANT ENVIRONMENTAL PROTECTION MEASURE.

IN CONCLUSION, WE WOULD LIKE TO THANK THE COMMITTEE FOR GIVING THE DEPARTMENT THE OPPORTUNITY TO EXPRESS OUR CONCERNS. WE APPRECIATE YOUR EFFORTS TO CORRECT WHAT WE FEEL IS AN UNJUST USURPATION OF STATE POWER UNDER THE CLEAN WATER ACT.

STATE OF NEW YORK
DEPARTMENT OF
ENVIRONMENTAL CONSERVATION
ALBANY, NEW YORK 12233-1015

LANGDON MARSH
EXECUTIVE DEPUTY COMMISSIONER

DEC 11 1987

The Honorable Max Baucus
Chairman
Subcommittee on Hazardous
  Wastes & Toxic Substances
United States Senate
Washington, DC 20510-6175

Dear Senator Baucus:

Enclosed please find a supplement to my written testimony submitted at the Subcommittee Hearing held November 24, 1987, concerning Senate Bill 1792. This submittal consists of a listing of the projects in New York affected by the retroactive nature of Order #464 issued by the Federal Energy Regulatory Commission on February, 1987. If you have any questions or would like further information, please feel free to contact Keith Silliman of my staff at 518-457-8809.

Sincerely,

Langdon Marsh

Langdon Marsh
Executive Deputy Commissioner

Enclosure

HYDROELECTRIC PROJECTS IN NEW YORK STATE
AFFECTED BY THE RETROACTIVE APPLICATION OF FERC ORDER 464

I. Water Quality Certificate (WQC) Denied, Denial Deemed Waived

Niagara Mohawk Power Corporation
Hudson Falls Project
FERC #5276
Project Review Commenced: 7/28/80
WQC Request Received: 8/24/81 & 1/13/87
WQC Denied: 1/6/87
Consultation Status: additional information requested - now under review

Unresolved PCB issues with respect to PCB's in the sediments located behind the Hudson Falls Dam. Will in all likelihood be resolved before January 1, 1988.

NYSERDA
Northumberland, Lock C-5 Project
FERC #6762
Project Review Commenced: 7/30/80
WQC Request Received: 8/8/83
WQC Denied: 10/7/83

Unresolved PCB issues concerning a PCB hotspot immediately upstream from the proposed project. The applicant never responded to our additional information request.

Eckhoff
Valatie Falls Project
FERC #8290
Project Review Commenced: 3/21/84
WQC Request Received: 4/26/86
WQC Denied: 5/12/86
Consultation Status: Final Comment Letter Submitted to FERC on 7/27/87

Mr. Eckhoff was informed that his WQC was denied without prejudice. The one-year time period imposed by FERC under 464 was due to expire and DEC would not consider application complete until FERC notice of application for license was published. This has been done, DEC has commented and 401 could be issued when Mr. Eckhoff agrees to condition in the Department's 7/27/87 comment letter.

II. Water Quality Certificates Issued, But Deemed Void

Long Lake Energy Corporation
Mechanicville Project
FERC #9706
Project Review Commenced: 11/6/81
WQC Request Received: 12/4/81 & 12/20/85
WQC Issued: 4/15/87
Consultation Status: 4/15/87 - WQC Issued

WQC Conditions:
- established minimum flow requirements
- fish bypass structures
- sediment disposal (PCB issue)

Niagara Mohawk Power Corporation
Mechanicville Project
FERC #6032
Project Review Commenced: 11/12/80
WQC Request Received: 3/18/85
WQL Issued: 4/15/87
Consultation Status: 9/22/87 - Reviewing Powerhouse Preservation Plan

WQC Conditions:
- established minimum flow
- fish bypass
- sediment disposal

Niagara Mohawk Power Corporation
South Glens Falls Project
FERC #5461
Project Review Commenced: 9/3/81
WQC Request Received: 10/7/81
WQC Issued: 6/27/86
Consultation Status - FWAC Comments to FERC 5/29/86

WQC Conditions:
- sediment disposal/analysis
- minimum resource requirement

Village of St. Johnsville
Zimmerman Creek Project
FERC #9920
WQC Request Received: Unknown
WQC Issued: 4/24/87
Consultation Status: Final Comments to FERC 4/18/87

WQC Conditions:
- establish minimum flows
- analysis of sediments

III. Water Quality Certification Requests Pending, but Deemed Waived

No.	Name	Developer	Project Review Commenced	Date of Request
9705	Bakers Falls	Long Lake	8/25/81	1/15/86
5763	N. Branch	"	8/13/82	8/31/84
9715	Eddyville Falls	REC	4/16/85	12/30/85
9871	"	Trafalger	11/5/85	"
5984	Oswego River	Niagara Mohawk	12/14/81	3/8/82
6570	Oswego/Varick	Carlson/Ledo	2/26/82	4/9/82
8846	Cannonsville	NYC	11/30/84	12/24/84
9710	Croghan Is.	Trafalger	N/A	12/20/85
9821	Ogdensburg	Trafalger/City	10/22/85	12/27/85
9260	Sissonville	Adirondack Hydro	N/A	5/15/86
9754	Rio	Webster	10/18/85	10/24/85
9694	Fine	Power Resources	8/6/84	5/9/85
8245	Forge Dam	Belmont/Tower	1/30/84	4/10/84

STATEMENT OF
ANTHONY G. WILLARDSON
ASSOCIATE DIRECTOR OF THE
WESTERN STATES WATER COUNCIL

SUBCOMMITTEE ON HAZARDOUS WASTES & TOXIC SUBSTANCES
COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS
UNITED STATES SENATE

ON
PERMITTING PROCEDURES
OF THE
FEDERAL ENERGY REGULATORY COMMISSION

NOVEMBER 24, 1987

DEAR MR. CHAIRMAN AND MEMBERS OF THE SUBCOMMITTEE:

MY NAME IS TONY WILLARDSON AND I AM THE ASSOCIATE DIRECTOR OF THE WESTERN STATES WATER COUNCIL. THE WESTERN STATES WATER COUNCIL WAS CREATED IN 1965 BY WESTERN GOVERNORS IN ORDER TO ACCOMPLISH EFFECTIVE COOPERATION AMONG WESTERN STATES, AS WELL AS FEDERAL AGENCIES, IN THE CONSERVATION, USE AND DEVELOPMENT OF WESTERN WATER RESOURCES. FIFTEEN STATES ARE REPRESENTED ON THE COUNCIL BY MEMBERS APPOINTED BY AND SERVING AT THE PLEASURE OF THE GOVERNOR OF EACH STATE. REPRESENTING THE COUNCIL, WE APPRECIATE THE OPPORTUNITY TO TESTIFY.

AS YOU ARE WELL AWARE, FERC ORDER NO. 464 HAS CAUSED CONSIDERABLE DIFFICULTY AMONG CERTAIN WESTERN STATES. MY COMMENTS FOCUS ON THE WAIVER OF THE WATER QUALITY CERTIFICATION REQUIREMENT UNDER SECTION 401 OF THE CLEAN WATER ACT (13 USC, 1341), BUT THIS IS BUT THE LATEST SYMPTOM RELATED TO THE FERC MALADY. ORDER NO. 464 HIGHLIGHTS FERC'S CONTINUING INSENSITIVITY TO STATE CONCERNS, WHICH IS A SIGNIFICANT OBSTACLE TO EFFECTIVE REGULATORY FEDERALISM.

BRIEFLY, FERC PUBLISHED A NOTICE OF PROPOSED RULEMAKING (NOPR) REGARDING THE 401 WAIVER ON AUGUST 6, 1985. THE COMMISSION'S PREVIOUS PRACTICE HAD BEEN TO DEEM THE ONE-YEAR WAIVER PERIOD, WITHIN WHICH STATES MUST CERTIFY OR DENY A 401 APPLICATION, TO COMMENCE WHEN THE CERTIFYING AGENCY HAD FOUND A REQUEST ACCEPTABLE FOR PROCESSING. THIS INTERPRETATION OF THE LAW WAS SET FORTH IN THE WASHINGTON COUNTY HYDRO DEVELOPMENT ASSOCIATES CASE (28 FERC Page 61, 341 (1984)). THE REASSESSMENT OF THIS PREVIOUS POLICY, AND I QUOTE, "WAS UNDERTAKEN IN LIGHT OF THE COMMISSION'S CONCERN THAT, UNDER THIS PRACTICE, STATES COULD

DELAY INDEFINITELY THEIR ACCEPTANCE OF A CERTIFICATION REQUEST, IN CONTRAVENTION OF THE CONGRESS' INTENT, THROUGH THE WAIVER PROVISION, TO PREVENT UNREASONABLE DELAYS, (I.E., OF MORE THAN ONE YEAR)." IT WOULD BE INTERESTING TO SEE WHAT DATA THE COMMISSION USED AS THE BASIS FOR SUCH AN ALLEGATION.

MOREOVER, IT WOULD BE ENLIGHTENING FOR THE COMMITTEE TO BROADEN THE FOCUS OF ITS OVERSIGHT TO ADDRESS THE APPROPRIATE ROLE OF THE STATE IN PROTECTING ENVIRONMENTAL VALUES AND FERC HYDROPOWER LICENSING PROCEDURES.

THE WESTERN STATES FEEL THAT CONGRESS' INTENT WAS MORE ACCURATELY REFLECTED BY THE WASHINGTON COUNTY HOLDING, WHICH RECOGNIZES THAT STATES HAVE THE PRIMARY ROLE IN ADMINISTERING THE CLEAN WATER ACT. INDEED, THE WESTERN STATES WATER COUNCIL STRONGLY CONTENDS THAT THE CONGRESS HAS ALWAYS INTENDED THAT THE STATES RETAIN PRIMARY RESPONSIBILITY FOR THE MANAGEMENT OF WESTERN WATER RESOURCES, BOTH QUANTITY AND QUALITY. THIS IS NOT A ROLE WHICH FERC CAN NOR SHOULD USURP.

THE FOCUS OF S.1792, SECTION 104, IS THE ONE-YEAR WAIVER PERIOD FOR STATE 401 CERTIFICATION. THE RETROACTIVE APPLICATION OF FERC ORDER NO. 464 IS ANOTHER EXAMPLE OF THE INSENSITIVITY FERC DEMONSTRATES IN ITS DEALINGS WITH THE STATES. THE ORIGINAL NOTICE OF PROPOSED RULEMAKING WHICH WAS MADE AVAILABLE FOR COMMENT HAD NO PROVISION EITHER IN THE EXPLANATORY TEXT OR THE PROPOSED REGULATION ADDRESSING ITS RETROACTIVE APPLICATION. AS A RESULT, PROMULGATION OF THE FINAL RULE GENERALLY FORECLOSED THE OPPORTUNITY FOR STATE COMMENT OR ACTION. FURTHER, IN MANY

INSTANCES, AS THIS BILL RECOGNIZES, IT EFFECTIVELY DENIED THE STATES THE RIGHT TO ISSUE OR DENY 401 WATER QUALITY CERTIFICATES, CONTRARY (WE BELIEVE) TO CONGRESSIONAL INTENT.

ON APRIL 2, 1987 THE ACTING DIRECTOR OF THE OFFICE OF HYDROPOWER LICENSING (UNDER ORDER NO. 464) ADDRESSED A LETTER TO 32 STATE AGENCIES LISTING 227 PROJECTS FOR WHICH STATE 401 CERTIFICATION HAD EITHER BEEN DEEMED WAIVED UNDER THE RULE OR WOULD BE DEEMED WAIVED BY JUNE 8, 1987 (30 DAYS AFTER THE EFFECTIVE DATE OF ORDER NO. 464 ON MAY 11, 1987). ELEVEN OF THE THIRTEEN MEMBER STATES OF THE WESTERN STATES WATER COUNCIL WERE AFFECTED. ONCE THE IMPACT OF THE ORDER WAS REALIZED, THE STATE OF CALIFORNIA PETITIONED FERC FOR A REHEARING OF ORDER NO. 464. SIMILARLY, MAINE, NEW YORK AND WASHINGTON FORMALLY PROTESTED IMPLEMENTATION OF THE NEW RULE. FERC DENIED CALIFORNIA'S PETITION BASED ON THE FACT IS WAS NOT FILED WITHIN 30 DAYS OF PUBLICATION OF THE RULE IN THE FEDERAL REGISTER, WHICH FERC DEEMS TO BE FINAL AGENCY ACTION. CALIFORNIA HAS APPEALED THAT DECISION TO THE NINTH CIRCUIT, WHERE FERC HAS MOVED TO HAVE THE ACTION DISMISSED, AGAIN CLAIMING THAT THE 30-DAY STATUTE OF LIMITATIONS HAD EXPIRED. SHOULD FERC PREVAIL, AND CALIFORNIA LOSE THAT CASE, LEGISLATIVE ACTION WOULD BE THE ONLY REMEDY. ENACTMENT OF S.1792, OF SECTION 104, WOULD SOLVE THE PROBLEMS.

AGAIN, THE EFFECT OF ORDER NO. 464 WAS TO TRANSFER RESPONSIBILITY FOR MANAGING THE WATER QUALITY IMPACTS OF THE 227 PROJECTS LISTED, FROM THE STATES TO THE FEDERAL ENERGY REGULATORY COMMISSION. THE FINAL RULE PROMULGATING ORDER NO. 464 INCLUDED A FOOTNOTE STATING THAT:

> "BECAUSE THE APPROPRIATE COMMENCEMENT DATE OF THE WAIVER FOR CERTIFICATION REQUESTS FOR HYDROELECTRIC PROJECTS HAS BEEN AN UNSETTLED QUESTION, THE COMMISSION WILL INSTRUCT THE DIRECTOR, OFFICE OF HYDROPOWER LICENSING, TO NOTIFY THE APPROPRIATE CERTIFYING AGENCIES THAT, IN THE EVENT OF CERTIFICATION REQUESTS THAT UNDER THIS RULE ARE DEEMED TO HAVE ALREADY BEEN WAIVED OR TO BE WAIVED...TO SUBMIT TO THE COMMISSION, WITHIN THIRTY DAYS...ITS COMMENTS AND RECOMMENDATIONS ON THE LICENSE APPLICATION WITH REGARD TO WATER QUALITY. THE COMMISSION...WILL CONSIDER INCLUSION IN THE LICENSE OF ANY WATER QUALITY CONDITIONS RECOMMENDED BY THE CERTIFYING AGENCY."

THIS HAS CREATED NO SMALL STIR AMONG STATE WATER QUALITY AGENCIES AND HAS ARGUABLY REDUCED WATER QUALITY PROTECTIONS. FOR EXAMPLE, THE GRAVE CREEK PROJECT (No. 6568), IN OREGON RECEIVED STATE CERTIFICATION ON MARCH 3, 1987 SUBJECT TO SPECIFIC CONDITIONS. AS A RESULT OF ORDER NO. 464, FERC DEEMED THE CERTIFICATION REQUIREMENT WAIVED AND LICENSED THE PROJECT WITHOUT APPLYING THE STATE'S CONDITIONS. IN SUCH INSTANCES, FERC HAS EFFECTIVELY USURPED THE AUTHORITY OF THE STATES TO PROTECT THE QUALITY OF ITS WATER RESOURCES. THIS HARDLY APPEARS TO BE CONSISTENT WITH CONGRESSIONAL INTENT. ANOTHER EXAMPLE OF THE PROBLEMS ENCOUNTERED DUE TO ORDER NO. 464 IN THE STATE OF OREGON IS THE SALT CAVES PROJECT ON THE KLAMATH RIVER. THE CITY OF KLAMATH FALLS FILED AN APPLICATION FOR CERTIFICATION ON AUGUST 25, 1986. THE STATE HAS EXPLICIT CRITERIA WITH REGARD TO THE INFORMATION WHICH MUST BE SUBMITTED, AND A COMPLETE APPLICATION WAS NOT RECEIVED BY THE STATE UNTIL MARCH 10, 1987--NEARLY FIVE MONTHS LATER. FOLLOWING PUBLIC HEARINGS, THE STATE DETERMINED

THAT CERTIFICATION SHOULD BE DENIED. HOWEVER, THE PROJECT SPONSOR AGREED TO MODIFY THE PROPOSAL. IN ORDER TO AVOID A WAIVER OF CERTIFICATION, THE OREGON DEPARTMENT OF ENVIRONMENTAL QUALITY WAS REQUIRED TO DENY CERTIFICATION IN EARLY AUGUST 1987. THAT DECISION HAS BEEN APPEALED TO THE STATE'S ENVIRONMENTAL QUALITY COMMISSION. EVEN THOUGH A CERTIFICATION DECISION WAS MADE WITHIN THE ONE-YEAR PERIOD, COUNSEL FOR THE APPLICANT NOW ARGUES THAT DUE TO THE APPEAL, A FINAL CERTIFICATION DECISION HAS NOT BEEN MADE AND THE REQUIREMENT SHOULD BE WAIVED UNDER ORDER NO. 464.

ANOTHER INSTANCE OF THE MISAPPLICATION OF DECISION NO. 464 INVOLVES THE NORTH STAR HYDRO PROJECT ON THE LITTLE WALKER RIVER IN CALIFORNIA. THE PROJECT SPONSOR REQUESTED A 401 CERTIFICATION APPLICATION FROM THE STATE IN A LETTER DATED DECEMBER 23, 1985. THE STATE RESPONDED BY SENDING THE NECESSARY MATERIALS AND INSTRUCTIONS FOR COMPLETING THE APPLICATION, BUT HAS AS YET NOT RECEIVED A REQUEST FOR CERTIFICATION FROM THE SPONSOR. ACCORDING TO THE STAFF OF THE STATE WATER RESOURCES CONTROL BOARD, FERC PROCEEDED TO WAIVE THE CERTIFICATION REQUIREMENT, BUT WHEN CHALLENGED BY THE STATE, COULD NOT DOCUMENT HAVING RECEIVED A COPY OF THE APPLICATION FOR CERTIFICATION. SIMILARLY, THE STATE OF IDAHO HAS REPORTED TWO INSTANCES WHERE WAIVER NOTICES WERE RECEIVED, BUT THE STATE WAS UNABLE TO FIND EVIDENCE THAT A REQUEST FOR CERTIFICATION HAD BEEN FILED. THE DIFFICULTY IN DOCUMENTING RECEIPT OF REQUESTS IS A PROBLEM WHICH NEEDS TO BE ADDRESSED AS IT AFFECTS BOTH THE RETROACTIVE AND PROSPECTIVE APPLICATION OF ORDER NO. 464.

ANOTHER PROBLEM RAISED BY THE STATES, IN THE WAKE OF ORDER NO. 464, IS THE DIFFICULTY STATES' WATER QUALITY STAFF ENCOUNTER IN TRYING TO EVALUATE THE IMPACT OF A PROJECT WHICH MAY ONLY BE IN ITS CONCEPTUAL STAGE. STATE RESOURCES ARE LIMITED, AND A SIGNIFICANT AMOUNT OF EFFORT CAN BE WASTED ON INCOMPLETE APPLICATIONS FOR 401 CERTIFICATION. HOW CAN THE STATE EVALUATE THE IMPACTS OF AN IDEA FOR A PROJECT--SOMETHING FROM 5-15 MEGAWATTS--WHICH MIGHT DIVERT WATER FROM A STREAM HERE, HERE OR HERE? UNDER ORDER NO. 464, THE STATE HAS TWO CHOICES -- REQUIRE THE APPLICANT TO QUICKLY SUPPLY THE OMITTED INFORMATION NECESSARY TO MAKE AN INFORMED DECISION OR SIMPLY DENY THE APPLICATION AS INCOMPLETE. THE TEN SLEEP PROJECT NEAR WORLAND, WYOMING IS ONE EXAMPLE. THE STATE RECEIVED A 401 APPLICATION FOR CERTIFICATION BEFORE THE PROJECT HAD HAD A SPECIAL USE OR SURFACE OCCUPANCY PERMMIT FROM THE U.S. FOREST SERVICE AND WHILE THE PROJECT PROPONENTS WERE STILL NEGOTIATING INSTREAM FLOW REQUIREMENTS WITH THE WYOMING GAME AND FISH COMMISSION. THE STATE CERTIFIED THE PROJECT WITH NUMEROUS CONDITIONS DUE TO THE MANY EXTANT CONTINGENCIES. OF NOTE, FERC HAS NO RECORD OF THE STATE'S CERTIFICATION AND LISTED THE PROJECT AMONG THOSE FOR WHICH THE ONE-YEAR PERIOD HAD ELAPSED AND THE REQUIREMENT WOULD BE WAIVED.

ON THE MORE GENERAL QUESTION OF FERC'S SENSITIVITY TO ENVIRONMENTAL CONCERNS AND STATE WATER RIGHTS I WOULD LIKE TO BRIEFLY DESCRIBE THE ROCK CREEK PROJECT IN CALIFORNIA. THE ROCK CREEK PROJECT IN EL DORADO COUNTY CALIFORNIA WAS ISSUED A FERC LICENSE IN 1983. IN 1984, THE PROJECT OBTAINED STATE WATER RIGHT PERMITS FROM THE CALIFORNIA STATE WATER RESOURCES CONTROL BOARD. HOWEVER, THE BOARD, AND FERC SPECIFICALLY RETAINED THE RIGHT TO REVISE MINIMUM BY-PASS FLOW REQUIREMENT, INITIALLY SET AT 11-15 CFS (VARYING BY MONTHS), GIVEN A LACK OF SUBSTANTIAL EVIDENCE

FROM WHICH TO SET PERMANENT FLOWS. FOLLOWING COMPLETION OF FURTHER STUDY OF THE STREAM'S FISHERY RESOURCES IN 1985, THE CALIFORNIA DEPARTMENT OF FISH AND GAME RECOMMENDED MINIMUM BY-PASS FLOWS OF 30-60 CFS. THE CALIFORNIA WATER RESOURCES CONTROL BOARD HELD PUBLIC HEARINGS ON THE ISSUE IN SEPTEMBER OF 1986, AND ESSENTIALLY ADOPTED THE FISH AND GAME RECOMMENDATIONS, AMENDING THE WATER RIGHT PERMITS ACCORDINGLY ON MARCH 19, 1987. HOWEVER, IN RESPONSE TO A PREVIOUS DRAFT ORDER BY THE BOARD MODIFYING THE FLOWS, DATED FEBRUARY 6, THE PROJECT OPERATOR FILED AN EMERGENCY REQUEST FOR EXPEDITED FERC ACTION ON A PETITION FOR A DECLARATORY ORDER. WITHOUT PROVIDING THE STATE WITH ANY NOTICE, FERC ACCEPTED THE EMERGENCY REQUEST, CONSIDERED THE PETITION, AND ON MAY 11, ISSUED A DECLARATORY ORDER WHICH STATED:

> "THE IMPOSITION OF MINIMUM FLOW RELEASES FOR FISHERY PROTECTION AND OTHER PURPOSES IS AN INTEGRAL PART OF THE COMMISSION'S COMPREHENSIVE PLANNING AND LICENSING PROCESS UNDER SECTION 10(a) OF THE FEDERAL POWER ACT (FPA). AS SUCH, THE ESTABLISHMENT OF MINIMUM FLOWS IS A MATTER BEYOND THE REACH OF STATE REGULATION. ALLOWING STATES TO PRESCRIBE MINIMUM FLOWS FOR LICENSED PROJECTS WOULD INTERFERE WITH THE COMMISSION'S BALANCING OF COMPETING CONSIDERATIONS IN LICENSING, SUCH AS FISHERY PROTECTION AND PROJECT ECONOMICS, AND WOULD ESSENTIALLY VEST A VETO AUTHORITY OVER THE PROJECTS IN THE STATES."

FERC BASED THE ABOVE PRESUMPTION ON THE SUPREME COURT'S FIRST IOWA DECISION. THE DECLARATORY ORDER FURTHER STATED THAT THE STATE WATER RESOURCES CONTROL BOARD (WRCB), "HAS NO AUTHORITY TO SET MINIMUM FLOWS FOR THE PROJECT THAT CONFLICT WITH THOSE

CONTAINED IN THE LICENSE, AND ROCK CREEK MUST COMPLY WITH THE FLOW REQUIREMENTS OF...ITS LICENSE UNTIL OTHERWISE ORDERED BY THE COMMISSION, IRRESPECTIVE OF ANY ACTION TAKEN BY WRCB."

IN SUPPORT OF THIS CONTENTION, IN A FOOTNOTE IN THE DECLARATORY ORDER, FERC REFERS TO A POSITION PAPER PREPARED BY THE HONORABLE SENATOR MAX BAUCUS (D-MT), WHICH WAS BASED ON SUGGESTED AMENDMENTS TO THE FEDERAL POWER ACT SUPPORTED BY THE WESTERN STATES WATER COUNCIL. LAST YEAR, DURING CONSIDERATION OF THE ELECTRIC CONSUMER'S PROTECTION ACT (ECPA) ON THE SENATE FLOOR, SENATOR BAUCUS AND SENATOR JAMES McCLURE (R-ID), AGREED DURING A COLLOQUY TO HOLD A HEARING ON THE RELATIONSHIP BETWEEN STATE WATER LAW AND THE LICENSING OF HYDROELECTRIC PROJECTS BY THE FEDERAL ENERGY REGULATORY COMMISSION. AS A RESULT OF THIS AGREEMENT, SENATOR BAUCUS DID NOT OFFER A SERIES OF AMENDMENTS TO THE FEDERAL POWER ACT, BASED ON THE WSWC POSITION, WHICH WOULD REAFFIRM CONGRESS' INTENT THAT FERC LICENSEES CONFORM TO STATE WATER LAW. SUBSEQUENTLY, THE SENATE APPROVED THE ELECTRIC CONSUMER'S PROTECTION ACT ON APRIL 17, 1986, BY AN 84-14 VOTE. THEREAFTER, CONGRESS APPROVED A CONFERENCE AGREEMENT AND ON OCTOBER 16, 1986 THE PRESIDENT SIGNED THE ELECTRIC CONSUMER'S PROTECTION ACT.

THE SENATE ENERGY AND NATURAL RESOURCES COMMITTEE SUBSEQUENTLY HELD THE PROMISED HEARINGS ON SEPTEMBER 12, 1986, AND THAT RECORD DOCUMENTS MANY PAST CONFLICTS BETWEEN FERC AND THE STATES. SENATOR FRANK MURKOWSKI (R-AK), CHAIRED THE HEARING AND STATED IN HIS OPENING REMARKS: "THIS HEARING WILL...BE A VALUABLE FIRST STEP IN DETERMINING WHETHER OR NOT AMENDMENTS TO THE FEDERAL POWER ACT ARE NEEDED TO ADDRESS STATE CONCERNS." IN A FOOTNOTE TO THE ROCK CREEK DECLARATORY ORDER, FERC OFFERS THIS

VARYING OPINION: "SINCE CONGRESS CHOSE NOT TO AMEND ECPA, TO VEST CONTROL OF WATER RIGHTS IN THE STATES AFTER HOLDING A HEARING ON THIS ISSUE, CONGRESS, IN PASSING ECPA, CONFIRMED THE COMMISSION'S EXCLUSIVE AUTHORITY OVER WATER RIGHTS MATTERS ASSOCIATED WITH LICENSED PROJECTS, INCLUDING THE AUTHORITY TO PRESCRIBE MINIMUM FLOWS FOR SUCH PROJECTS."

AGAIN, PRIOR TO ISSUING ITS ROCK CREEK DECISION, FERC DID NOT SEE FIT TO NOTICE THE STATE WATER RESOURCES CONTROL BOARD, NOR THE STATE DEPARTMENT OF FISH AND GAME. THE BOARD RECEIVED THE FERC DECISION FOUR DAYS AFTER IT WAS RENDERED AS PART OF A REGULAR INFORMATIONAL MAILING. THE STATE PETITIONED FERC FOR A REHEARING, AND WHILE AWAITING ACTION FILED SUIT IN THE DISTRICT COURT IN CALIFORNIA. THAT CASE WAS ARGUED AND THE STATE IS AWAITING THE DECISION. HOWEVER, FERC LAST WEEK DENIED THE STATE'S PETITION FOR REHEARING. THE STATE IS NOW PREPARING AN APPEAL TO THE NINTH CIRCUIT AND EXPECTS FROM THERE TO TAKE THE CASE TO THE SUPREME COURT. GIVEN THE SUPREME COURT'S U.S. v CALIFORNIA DECISION IN 1978, WESTERN STATES ARE OPTIMISTIC THAT THE SUPREME COURT WILL OVERTURN FIRST IOWA OR MAKE A DISTINCTION IN THE STATE'S FAVOR AS FIRST IOWA WAS NOT STRICTLY A WATER RIGHTS CASE.

AS THE ROCK CREEK CASE ILLUSTRATES, FERC DECISIONS DO NOT ALWAYS FAVOR FISH AND WILDLIFE. THE WESTERN STATES WATER COUNCIL CONTENDS THAT THE INTENT OF CONGRESS HAS ALWAYS BEEN TO ALLOW STATES TO MAKE WATER ALLOCATION AND MANAGEMENT DECISIONS INCLUDING PROVIDING PROTECTION FOR FISH AND WILDLIFE. THE BY-PASS FLOWS MANDATED BY THE CALIFORNIA STATE WATER RESOURCES CONTROL BOARD IN THE ROCK CREEK CASE ARE TWO TO FOUR TIMES GREATER THAN THOSE PRESENTLY REQUIRED BY FERC. OBVIOUSLY GREATER

ENVIRONMENTAL PROTECTION WOULD BE AFFORDED BY RECOGNIZING THE STATE'S RIGHT TO ALLOCATE WATER IN THIS INSTANCE. MOREOVER, SHOULD CALIFORNIA PREVAIL IN THE SUPREME COURT OR CONGRESS CHOOSE TO CORRECT FERC BY REAFFIRMING ITS INTENT THAT STATES ALLOCATE WATER, FISH AND WILDLIFE IN PARTICULAR AND THE ENVIRONMENT GENERALLY, WILL BENEFIT AS HYDROPOWER PROJECT OPERATORS WOULD BE REQUIRED TO COMPLY WITH BOTH STATE WATER RIGHT PERMITS AND FERC LICENSES, THEREBY PROVIDING THE HIGHEST POSSIBLE PROTECTION.

IN ADDITION TO PROVIDING A REMEDY FOR CURRENT STATE/FERC CONFLICTS UNDER SECTION 401 OF THE CLEAN WATER ACT, WE WOULD URGE THE SENATE TO CONSIDER CORRECTING SIMILAR FERC ABUSES DUE TO THEIR DENIAL OF THE STATE'S JURISDICTION OVER THE MANAGEMENT OF THE QUALITY AND QUANTITY OF STATE WATER RESOURCES.

AGAIN, WE SUPPORT SECTION 401 OF S.1792 AND URGE THE SENATE TO FURTHER ADDRESS CONFLICTS BETWEEN ADMINISTRATION OF STATE WATER RIGHTS SYSTEMS AND FERC HYDROELECTRIC PROJECT LICENSING.

THANK YOU FOR THE OPPORTUNITY TO TESTIFY.

POSITION
of the
WESTERN STATES WATER COUNCIL
Regarding the
Federal Energy Regulatory Commission Order No. 464
July 31, 1987

WHEREAS, on August 6, 1985, the Federal Energy Regulatory Commission (FERC) published a Notice of Proposed Rulemaking ("NPRM") regarding the waiver of the water quality certification requirement of Section 401 of the Clean Water Act, 13 USC, 1341 (CWA); and

WHEREAS, on February 23, 1987, FERC published Order No. 464 (52 FR 5446), which became effective May 11, 1987; and

WHEREAS, in Order No. 464, FERC changed its longstanding interpretation of the commencement of the 401 Water Quality Certificate waiver period from the date on which the certifying agency finds the application to be acceptable for processing, to the date the certifying agency receives the certification request; and

WHEREAS, Order No. 464 is applicable to all hydroelectric applications filed after the May 11, 1987 effective date; and

WHEREAS, in addition to applying this rule to all hydroelectric license applications filed after the effective date, FERC has applied the new interpretation to pending license applications that do not yet have Section 401 certification; and

WHEREAS, for the pending license applications, FERC will deem certification to be waived one year after the date the certifying agency received the certification request; and

WHEREAS, the new interpretation is inconsistent with FERC's prior interpretation of the 401 waiver period as set forth in Washington County Hydro Development Associates, 28 FERC p. 61, 341 (1984), which has been relied upon by the states in processing Section 401 certification requests; and

WHEREAS, the Washington County Hydro decision held that the one-year waiver period under Section 401(a)(1) commenced on the date a state agency deems an application acceptable for processing; and

WHEREAS, when the NPRM was made available for comment, it had no provision, either in explanatory text or proposed regulation, for retroactivity; and

WHEREAS, the states thus were not provided with notice of the potential retroactivity of Order No. 464 in the initial NPRM and could not have addressed this problem; and

WHEREAS, applying the new interpretation retroactively will effectively deny the states the right to issue or deny 401 Water Quality Certificates under the Clean Water Act; and

WHEREAS, the Clean Water Act specifically recognizes the need for certifying agencies to provide public notice and hold public hearings on specific applications; and

WHEREAS, the public notice and public hearing provision of the Clean Water Act includes the appeal process.

NOW THEREFORE BE IT RESOLVED that the Western States Water Council requests FERC to reconsider and modify Order No. 464, without further hearing, to apply only prospectively to hydroelectric license applications filed after the effective date of the rule and thereby preserve the Washington County Hydro rule for prior applications.

BE IT FURTHER RESOLVED that the Western States Water Council supports modification of Order No. 464 to specifically allow each state to determine at which point an adequate 401 application has been received for purposes of deciding when the one-year review period begins, and to clearly state that the one-year review period is automatically extended to 90 days after the completion of an appeal process.

WESTERN STATES WATER COUNCIL
220 South 2nd East / Suite 200 / Salt Lake City, Utah 84111 / Phone (801) 521-2800

December 4, 1987

The Honorable Max Baucus, Chairman
Subcommittee on Hazardous Waste & Toxic Substances
United States Senate
706 Senate Hart Office Building
Washington, D.C. 20510-2601

Dear Senator Baucus:

On behalf of the Western States Water Council, I want to thank you for the opportunity to testify on S. 1792, Section 104. Unfortunately, your letter of November 17, providing a written invitation to testify and asking various questions, did not arrive in our office until after I had already left for Washington, D.C. In addition to our written testimony and oral presentation, I would like to submit for the record and your review the enclosed materials. They provide more information on specific projects that have been affected by FERC Order No. 464. Also, enclosed is a chronology of important WSWC activities and other events relating to the relationship of FERC and the states on water management issues in general. Further, the following are offered as my personal responses to the five questions raised in your letter of invitation, which I have forwarded to several of our members for their separate review and comment.

With respect to FERC/state cooperation, the enclosed chronology sets forth some of our past efforts to reach intergovernmental accommodation. However, our experience is that FERC has been unresponsive to state concerns. FERC appears to jealously protect its "turf," and views state water management concerns as a threat to its alleged authority under the Supreme Court's *First Iowa* decision. FERC seems to use the *First Iowa* decision as a shield in order to avoid addressing serious management problems within the agency related to ongoing conflicts with the states. This attitude impairs federal/state relations and efficient regulatory federalism.

More and more, I observe that western state water management officials question the need for any FERC involvement in hydropower licensing. In my view, the national interest in this area should be reconsidered by the Congress. Past mandates may no longer be valid, given current market conditions. Arguably, the national interest in small hydropower development is not what it used to be, particularly given that many small projects on intrastate streams generate insignificant amounts of power--which only add to the current glut of electricity. Further, unilateral federal water management decisions by FERC, ignoring legitimate state concerns and responsibilities, has created a regulatory quandary, rather than the certainty necessary to promote orderly hydropower development.

Again, FERC Order No. 464 is but another example of the agency's insensitivity to state interests, and its negative impact in different states is documented in our written testimony. However, the case studies presented therein are only an example of the problems related to Order No. 464 and not a comprehensive evaluation.

With respect to FERC compliance with NEPA requirements, the Western States Water Council has no position. However, I believe more closely coordinating all federal and state project review requirements would facilitate efficient regulation--protecting legitimate public interests while promoting wise development.

With respect to questions regarding the past 401 certification process and future improvements, it appears that some action might be taken to better define what constitutes an adequate application and/or at what point in the process the application should be considered subject to the one-year time limit for review. Some state officials favor tieing Section 401 certification into the Section 404 permit process. At that point, a project proposal generally is of sufficient substance to allow for prompt state review and 401 certification. Much of the delay in the past, between receipt of a 401 certification request and final state action, has been caused by the fact that many requests are filed without adequate documentation. The states are left in the position of evaluating an evolving project proposal--which later may or may not resemble what the state was originally asked to certify.

While we have no information with regard to the average length of time between the beginning of the certification process and receipt by the state of an acceptable and complete application, in some instances it has taken over two years. As a result, the impact of the retroactive application of Order No. 464 is apparent. We believe it was Congress intent, under Section 401 of the Clean Water Act, that FERC cannot override the certification decision by a state. However, in effect, through the retroactive application of Order No. 464, FERC has presumed to do just that. In the future, it appears logical that a state will quickly review certification requests and deny without prejudice those which are incomplete--or allow the project sponsor a short time (30-60 days) to respond to state requests for supplemental information.

Senator Baucus
December 4, 1987
Page 3

Again, the Western States Water Council strongly supports Section 104 of S. 1792 as a remedy to the retroactive application of FERC Order No. 464, which we believe is a grevious affront to federal/state relations and explicit Congressional intent. We would urge the Senate to further review the national interest and FERC's role in hydroelectric licensing, and how the agency should accommodate state concerns and responsibilities.

Thank you for the opportunity to express our views.

Sincerely,

Tony Willardson

Tony Willardson
Associate Director

Enclosures

NOTE: The attachments to theis letter have been retained in committee files.

STATEMENT
OF
DAVID R. CONRAD
WATER RESOURCES SPECIALIST
FOR
FRIENDS OF THE EARTH

BEFORE THE HAZARDOUS WASTE AND TOXIC SUBSTANCES SUBCOMMITTEE
OF THE
SENATE ENVIRONMENT AND PUBLIC WORKS COMMITTEE

REGARDING S. 1792
THE OFFICE OF ENVIRONMENTAL QUALITY AUTHORIZATION BILL

SUBMITTED FOR HEARINGS

NOVEMBER 24, 1987

Mr. Chairman and members of the Subcommitte, my name is David Conrad, and I serve as a specialist on water resources issues for Friends of the Earth, a national conservation organization. I appreciate the opportunity to appear before you today and offer the views of Friends of the Earth with regard to S. 1792, a bill to authorize continued operation of the Office of Environmental Quality and for other purposes.

INTRODUCTION

I will begin by indicating our strong support for enactment of this legislation. First, the bill would authorize appropriations for the staffing of the President's Council on Environmental Quality for fiscal 1987, 1988, and 1989. Second, it would authorize a program for the Council and federal agencies to review random, statistically significant samples of detailed statements prepared pursuant to section 102(2)(C) of the National Environmental Policy Act to determine the extent to which recommended project mitigation measures were implemented, the accuracy of environmental impact predictions and the effectiveness of the implemented mitigation. Third, the bill would clarify the generally held position that the regulations promulgated by the President's Council for implementing the National Environmental Policy Act are applicable to independent regulatory commissions as well as other agencies. And finally, the bill provides that states will be allowed one year from the date of enactment to satisfy the certification requirement provided for in section 401 of the Clean Water Act, where the retroactive application of a recent order of the Federal Energy Regulatory Commission (Order No. 464) deprived states of their certification authority.

Each of these provisions have strong merit. Except for the last, identical or nearly identical measures have passed the House of Representatives with strong support. It is especially the latter two issues that I wish to address in some detail in the Subcommittee's hearing today.

I will address the first two issues briefly.

I. AUTHORIZATION OF THE OFFICE OF ENVIRONMENTAL QUALITY IS IMPORTANT AND NECESSARY TO ASSURE CONTINUATION OF THE WORK OF THE COUNCIL ON ENVIRONMENTAL QUALITY.

In order to carry out its vital duties and functions, the CEQ's Office of Environmental Quality must have authorization and sufficient appropriations. We strongly endorse the bill's provision reauthorizing the OEQ at a strenthened level, as was endorsed by the House, to allow for the possiblity of a stronger program, and to help ensure its continuity. The Council has provided much leadership in the past in promoting environmental quality and will have an even greater job in the future.

II. MITIGATION REVIEWS ARE NEEDED AND COULD POINT THE WAY TO IMPROVING FEDERAL AGENCY NEPA IMPLEMENTATION.

The amendments requiring federal agencies and the Council to do sample reviews of their environmental statements is potentially an important means of evaluating the relative success of NEPA's implementation. Far too often mitigation measures are proposed as part of a project, but lag behind and sometimes never get accomplished. The most recent example of this of which I am aware regards a Bureau of Reclamation project in the State of Washington, where a decade ago the project was authorized for irrigation works and fishery mitigation, and to date the proposed fishery mitigation described in the environmental statement has not been done; however, the agency has returned to Congress for an authorization ceiling increase because virtually all of the money had been expended on the development. In this case mitigation has clearly taken a back seat. (see House Interior Committee Report 100-365, p. 11).

While it is no secret that this kind of situation arises, our hope is that the proposed review program would at least cause agencies to evaluate the effectiveness of their NEPA programs and suggest means of improving them. Such reviews should be a routine part of any agency's NEPA compliance.

III. THE CLARIFICATION THAT THE CEQ NEPA REGULATIONS APPLY TO INDEPENDENT REGULATORY COMMISSIONS IS NECESSARY TO ASSURE ADEQUATE IMPLEMENTATION OF NEPA.

In general, federal agencies, including independent regulatory commissions, have recognized the applicability of the NEPA implementing regulations (found at 40 C.F.R. 1500-1508) as binding on them and have incorporated these regulations into their own procedures for carrying out the requirements of the National Environmental Policy Act. The Supreme Court in Andrus v. Sierra Club, 442 U.S. 347, 358 (1979), held that the CEQ regulations were a "detailed and comprehensive process ordered by the President, of transforming advisory guidelines into mandatory regulations applicable to all federal agencies." However, one federal agency, the Federal Energy Regulatory Commission (FERC), in particular, has continued to hold that it is not bound by these implementing regulations, even though that position is disputed by the Council on Environmental Quality, the EPA and other agencies. We strongly support the amendment in Section 101 of S. 1792, which would clarify the applicability of CEQ's regulations to independent regulatory commissions, such as FERC.

One of the most discouraging and exasperating concerns of national conservation organizations has been the manner in which FERC has implemented NEPA, and, in part, the difficulty has stemmed from the agency's position over the years that it is not bound by the CEQ regulations. The Commission is charged with licensing virtually all hydroelectric power projects, which, by their nature can have highly significant adverse impacts on the environment. Due to regulatory, marketing and tax incentives enacted by Congress in 1978, 1980 and 1981, as well as a general rise in energy prices, FERC has been flooded with an unprecedented avalanche of hydroelectric applications that have strained both it's ability and the ability of resource agencies and the public to properly evaluate and avoid or mitigate environmental impacts in a NEPA and licensing context. We believe that FERC's unwillingness to adopt the CEQ regulations over the past nine years since they were promulgated has hindered the agency's NEPA implementation.

In part, this was the subject of oversight hearings on the

Commission's Small Hydro Program, that were conducted by the House Subcommittee on Energy Conservation and Power in the fall of 1984. In a summary letter sent by Subcommittee Chairman Richard Ottinger, and Subcommittee members Representatives Al Swift and Ron Wyden to then FERC Chairman Raymond J. O'Connor, the Energy Committee members said "The basic complaint lodged against the Commission in the September 11 hearing is that the Commission continues to give insufficient systematic attention to the protection of non-developmental amenities that are of enormous value to the public...." and in specifically addressing NEPA concerns, the letter states "The Commission has been negligent in applying the requirements of the National Environmental Policy Act to the small hydro program and has failed to bring its NEPA regulations into compliance with the Council on Environmental Quality guidelines." (Small Hydro Program Hearings, House Energy and Commerce Committee, No. 98-182, Sept. 11, 1984, p. 296, 297.)

In at least two recent instances, the Courts also have criticized FERC's NEPA compliance. In a 9th Circuit Court decision, the Steamboaters v. F.E.R.C, 759 F.2d. 1382 (9th Cir. 1985), the Court found that FERC's decision not to prepare an EIS before issuing a hydroelectric exemption for the Winchester Dam on Oregon's North Umpqua River was fatally flawed. Among other things, the Court cited the Commission's lack of preparation of an environmental assessment had violated the CEQ regulations. The Court voided the exemption and remanded the case to FERC for further NEPA analysis.

In the other important case (Confederated Tribes and Bands of the Yakima Indian Nation v . F.E.R.C., 746 F. 2d. 466 (9th Cir. 1984), cert. denied, 741 U. S. 1116 (1985)), a FERC-issued order relicensing the Rock Island Dam on the Columbia River was set aside for the Commission's failure to prepare an environmental impact statement and failure to resolve fisheries issues before licensing. While it is certainly speculative, we believe that if the Commission had previously adopted the CEQ regulations, it is concievably less likely that the Commission would have misread the requirements of NEPA, in part, because roles and responsibilities are better defined in CEQ's regulations than in the Commission's 1972 regulations, and the purpose and needs review and alternatives review would have been brought into sharper focus.

While the Commission did propose NEPA implementing regulations that were based on the CEQ regulations in 1979, these were never finalized, and as the Subcomittee members are aware, the FERC reproposed a set of NEPA rules on May 29th of this year. The proposed rules were criticized, however, by the CEQ, other agencies and conservation organizations, including Friends of the Earth, for adopting some of CEQ's rules, discarding others and modifying still others, and for finding "inconsistencies" with its mandate where none exist.

Key issues noted in comments by CEQ, EPA and the Department of Interior as well as environmental organizations were concerns regarding:

1. the decision not to adopt all of the CEQ regulations;

2. the rejection of the CEQ referral process;
3. the manner of handling categorical exemptions;
4. the modification of cumulative impacts definition;
5. the narrower definition of "purpose and need" for a project
6. the narrowing of consideration of alternatives;
7. the decision to make monitoring and enforcement of EA-based mitigation non-mandatory;
8. the option to supplant EPA's notice of availability of an FEIS and to equate post-FEIS review period with the rehearing period;
9. the decision to downgrade levels of generally required EIS and EA reviews from the 1979 proposed rules; and,
10. the decision that only hydroelectric projects exceeding 20 MW would ordinarily require an EIS.

While other concerns were raised as well, the basic point is that by tinkering a great deal with the established NEPA process, the advantages of consistency of NEPA implementation among all federal agencies are lost. This is especially important to members of conservation organizations such as Friends of the Earth because the established CEQ NEPA process is well known to the public and that familiarity "demystifies" the manner of public involvement in environmental reviews. FERC should adopt the CEQ regulations in full and only deviate, as the regulations allow, where a clear statutory conflict exists.

Finally, whenever the Commission errs in instances where its NEPA process finds "no significant impact" and such impact actually exists, the public is deprived of the special opportunity NEPA affords to review and comment on a draft environmental impact statement. Passage of S. 1792 will help assure that the same standards of review that are utilized by other federal agencies will also apply to the Commission. According to FERC, while some 530 hydroelectric projects have been placed into operation since 1980 and hundreds more have been licensed or exempted, from 1972 to May of 1987 only 46 hydroelectric EIS's were prepared. It is our hope that passage of S. 1792 will improve opportunities for the public to be involved in FERC's environmental reviews.

IV. STATES WHICH HAVE LOST WATER QUALITY CERTIFICATION AUTHORITY BY ACTION OF FERC ORDER NO. 464 SHOULD BE GRANTED AN ADDITIONAL YEAR TO CARRY OUT THEIR AUTHORITY TO ASSURE PROPER EXECUTION OF THE CLEAN WATER ACT.

Mr. Chairman, I would like to reiterate Friends of the Earth's strongest support for Section 104 of S. 1792, which would grant to states and interstate pollution control agencies a one year extension of water quality certification authority under Clean Water Act where states have been deemed to have waived such authority by retroactive application of FERC Order No. 464. This legislation is essential to assure that the nation's key water quality law, the Clean Water Act, will be properly applied to the bulk of hydroelectric power projects currently pending in the licensing process.

It is difficult to imagine why FERC, in Order 464, chose to retroactively apply its new rule regarding when the period for state Section 401 action is deemed to have expired. The retroactivity issue was not raised in the proposed rule. It had only the briefest discussion in the final rule. While the

Commission may have changed its interpretation to a literal reading of the term "receipt of [] request", there was nothing wrong with its prior interpretation in the Washington County decision, which allowed states to determine when a completed water quality certification application had been received. The Commission should have fashioned a transition rule to assure that state authorities would be protected. In the alternative, the Commission could have submitted proposed legislation to the Congress to guard state authority in the interim.

One cannot help but view this action by the Commission as a gratuitous slap in the face of state authority to participate in hydroelectric power regulation. Nevertheless, the FERC decision seriously weakens the Clean Water Act's program by automatically waiving state authority for some 227 hydroelectric power projects, according to Answers to Questions submitted by FERC Chairman Martha O. Hesse on May 26, 1987 to the House Subcommitte on Energy and Power (relevant portions of these answers attached to this testimony).

Several states have had their certifying authority waived for significant numbers of projects, including California (46), Washington (39), New York (28), Idaho (16), Montana (8), Oregon (8), New Hampshire (8), Vermont (7), Pennsylvania (7), Maine (6), and West Virgina (6). Twenty-one other states have one to five projects where certification authority is deemed waived as a result of FERC's order, according to the agency's list. Further, in 86 of these cases, decisions to either certify (usually with binding conditions) or to deny certification were already issued by states, but the Commission's retroactive application has rendered these state decisions without legal effect, at least as far as FERC is concerned. The State of California has filed a lawsuit to overturn the FERC order, but the Commission has argued that the State failed to request a "rehearing" of the order within the 30-day statutory period and that the Court has no jurisdiction to review the case.

Of particular concern to Friends of the Earth is the fact that state water quality certification proceedings are often the most important and accessible proceedings for public participation in reviewing hydroelectric projects. While the range of issues considered are narrower than those FERC considers, more local hearings are held and a number of states have moved in recent years to integrate their water quality certification programs with state river planning to strengthen the basis upon which certification decisions are made. Maine, Vermont, Oregon and California, among others, have sought a more comprehensive approach to water quality reviews.

Finally, the retroactive application of Order No. 464 has affected some of the most controversial hydroelectric proceedings in a number of states. The effects of such developments are particularly strongly felt locally, so the public policy of sharing responsibility with states regarding hydroelectric approvals as envisioned in the Clean Water Act is an essential part of a proper licensing program. Friends of the Earth and other national conservation organizations were strongly supportive of last year's enactment of provisions in the Electric

Consumers Protection Act, which were intended to grant a higher level of deference to state plans in hydro licensing. The retroactive application of Order No. 464 is effectively a one-hundred eighty degree reversal on the direction indicated in ECPA. The Congress should correct this situation by passage of Section 104.

CONCLUSION

S. 1792 is a good bill that deserves the support of the Environment and Public Works Committee and the full Senate. I very much appreciate the opportunity to present testimony and would be happy to respond to any questions which the Members may have. Thank you.

ATTACHMENT A

FEDERAL ENERGY REGULATORY COMMISSION
WASHINGTON, D.C. 20426

CHAIRMAN

May 26, 1987

Dear Mr. Chairman:

Thank you for your letter dated May 14, 1987, enclosing a set of pre-hearing questions concerning matters under the jurisdiction of the Federal Energy Regulatory Commission.

I appreciate your interest and am pleased to submit the enclosed responses to your questions prepared by the Commission's staff. Under separate cover, I am forwarding fifty (50) advance copies of my prepared testimony for the subcommittee's review.

My fellow commissioners and I look forward to appearing before your subcommittee on May 28.

If I can be of any further assistance, please do not hestitate to call me.

Sincerely,

Martha O. Hesse

Honorable Philip R. Sharp
Chairman
Subcommittee on Energy and Power
Committee on Energy and Commerce
House of Representatives
Washington, D.C.   20515

Question 49(a): Please submit to the Subcommittee the total numbers and a listing of all pending hydropower licensing cases identified by state, location, affected river, project number and date of submission of application for water quality certification where:

(1) no determination on state 401 certification had been made, but more than 1 year had elapsed from the date of submission to the affected state for a water quality certification; or where

(2) a 401 water quality certification application had been submitted to the state and the state had acted to either issue or deny the 401 certification, but the state had failed to act within 1 year of the application's submission. Please indicate whether the state's decision in each case was to deny or to issue the 401 certification.

Answer: The attached table A describes the licensing cases covered under category (1), while table B specifies those cases covered under category (2).

Question 49(b): In the above described circumstances, is it the Commission's position that state 401 water quality certification should be deemed to have been waived for purposes of hydroelectric licensing? Please explain.

Answer: Yes. On February 11, 1987, the Commission issued a rule interpreting section 401 of the Clean Water Act (CWA). Order No. 464, 52 Fed. Reg. 5446 (Feb. 23, 1987), III FERC Stats. & Regs. ¶ 30,730. The Commission determined that section 401(a)(1) of CWA requires that certification be considered waived if the certifying agency fails to act on the applicant's request for the section 401 certification within a reasonable period of time, not to exceed 1 year from the date the certifying agency received the applicant's request for certification. For the projects listed in Tables A and B, the 1 year period had expired and, therefore, certification is waived.

Consistent with section 401 (a)(1) of the CWA, as interpreted in Commission Order 464, certification is waived for pending license applications where an agency took an action more than 1 year after receipt of the request. However, pursuant to the provisions of Order 464, the Director, Office of Hydropower Licensing, has notified the appropriate certifying agencies of the waivers and invited them to submit comments and recommendations on the license applications with regard to water quality within 30 days of the effective date of Order 464, or by June 10, 1987. No action will be taken by the Commission on these license applications until after the 30-day comment period. Further, the Commission will consider the inclusion in the license of any water quality conditions recommended by the certifying agency.

Question 49(c): It has been the Commission's position in the past that projects exempt from licensing do not require certification under section 401 of the Clean Water Act. Does the Commission continue to hold this view? Please explain.

Answer: The Commission has held that exemption applicants are not required to obtain section 401 certification, since section 401 specifically applies only to licenses. Order No. 106, 45 Fed. Reg. 76,115 (November 18, 1980) [Reg. Preambles 1977-1981], FERC Stat. & Reg. ¶ 30,204 at 31,368 (1980). However, the Commission is reassessing this issue and intends to issue a notice of proposed rulemaking on this matter in the near future in order to give the public notice and opportunity for comment.

Table A. Pending hydropower applications where the state certifying agency has not taken an action on the 401 request and 1 year has elapsed since date of submission of the request.

Project No.	Project Name	State	Nearest City	River	Date of Request for 401 Certificate
6433	Riordan Creek	ID	Yellow Pine	Riordan	4/26/84
6863	Gibson Dam	MT	Augusta	Sun	4/17/84
7969	Falls Creek	WA	Glacier	Falls Creek	12/26/83
5841	North Yuba	CA	Sierra	Yuba	7/29/82
6156	Zack Brothers	CA	Bishop	Pellister Creek	6/18/84
6488	Big Mosquito	CA	Forest Hills	Big Mosquito Cr.	11/4/84
4017	Allegheny L&D 2	PA	Sharsburg	Allegheny	6/21/84
4474	Allegheny L&D 3	PA	Sharsburg	Allegheny	9/20/84
6901	New Cumberland	OH	New Cumberland	Ohio	5/12/86
7909	Allegheny L&D 4	PA	Natrona	Allegheny	12/2/83
9727	Bellamy's Mill	NC	N.Whitakers	Fishing Cr.	10/25/85
9840	Appomattox	VA	Petersburg	Appomattox	10/15/85
9999	Willow Island	WV	Willow Is.	Ohio	5/12/86
1889	Turners Falls	MA	Turners Falls	Connecticut	12/16/85
7932	Tolles Hill	VT	Weathersfield	Black	2/22/85
8245	Forge Dam	NY	Belmont	Chateau	12/19/84
8459	Swanton Dam	VT	Swanton	Missisquoi	2/10/86
8846	Cannonsville	NY	Deposit	West Br.Delaware	12/27/84
8974	Upper Factory	NH	Dover	Cocheco	5/8/86
9694	Fine	NY	Fine	Oswegatchie	5/9/85
9401	Mount Hope Pumped Storage	NJ	Dover	Mount Hope Lake	5/22/85
9871	Eddyville	NY	Eddyville	Rondount Creek	12/20/85
2576	Housatonic	CT	New Milford	Housatonic	10/10/85
2597	Little Falls Village	CT	Falls Village	Housatonic	3/1/85
2756	Chace Mill	VT	City of Winooski	Chace Mill	8/12/85
5763	North Branch	NY	Watertown	Black	6/30/85

Table A. Continued

Project No.	Project Name	State	Nearest City	River	Date of Request for 401 Certificate
6762	Northumberland	NY	Northumberland	Hudson	10/7/83
9010	Benjamin Falls	VT	Berlin	Benjamin Falls	9/29/85
9175	Eddyville Falls Dam	NY	Eddyville	Rondout Creek	5/28/85
2335	Williams	ME	Embden	Kennebec	1/20/86
2528	Cataract	ME	Biddeford	Saco	1/7/86
3572	Livermore Falls	NH	Campton	Pemigewasset	9/23/82
6456	East Hydro	NY	Troy	Hudson	9/25/85
8158	Littlefield	ME	Auburn	L.Androscoggin	4/22/86
8958	Macallen Dam	NH	Newmarket	Lamprey	1/30/84
9260	Sissonville	NY	Sissonville	Raquette	5/6/86
9732	Brookside	NH	Lebanon	Mascoma	1/8/86
2582	Rochester Upper Falls	NY	Rochester	Genesse	3/15/83
2727	Ellsworth	ME	Ellsworth	Union	11/13/84
5461	South Glens Falls	NY	South Glens Falls	Hudson	10/7/81
5984	Oswego River	NY	Oswego	Oswego	2/12/82
6570	Canson-Leto	NY	Oswego	Oswego	7/28/82
6632	Wiswall	NH	Durham	Lamprey	4/3/86
8404	Windsor L&D	CT	Windsor	Connecticut	3/29/84
9541	Fair Haven	VT	Fair Haven	Castleton	2/10/86
9705	Hudson Falls	NY	Bakerfields	Hudson	12/20/85
1061	Phoenix Hydro	CA	Columbia	S.F.Stanislaus	2/1/80
1354	Crane Valley	CA	Oakhurst	Willow Creek & N.F. & S.F. Willow Creek, Browne Creek, etc.	4/29/86
1394	Bishop Creek	CA	Bishop	Bishop Creek, McGee Creek, Birch Creek	3/28/86
9277	Riverside	NH	Lebanon	Mascoma	6/4/85

Table A. Continued

Project No.	Project Name	State	Nearest City	River	Date of Request for 401 Certificate
3272	Leggett Hydro	CA	Lee Vining Creek	Lee Vining	2/26/82
	San Antonio Creek	CA	Sheep Ranch	San Antonio Creek	6/30/85
8377	Isabella Hydro	CA	Bakerfield	Kern River	5/9/85
8725	North Fork Battle	CA	Manton	N.F.Battle Creek	12/1/85
9086	Excelsior Hydro	CA	Nevada City	S.F.Yuba River	8/24/84
9878	Rock Shadow Hydro	CA	Bridgeville	N.F.Larabee Creek	1/13/84
1869	Thompson Falls	MT	Thompson Falls	Clark Fork	3/2/82
3486	Easton Dam	WA	Easton	Yakima	10/15/82
4282	Deadhorse Creek	WA	Glacier	Deadhorse	1/14/83
4738	Glacier	WA	Glacier	Glacier Creek	10/16/84
5205	Lava Diverson	OR	Bend	Deschutes	11/28/83
9787	Jordon Creek	WA	Marblemount	Jordon Creek	12/2/85
9967	Shoshone	ID	Shoshone	Little Wood	3/27/86
6221	Black Creek	WA	North Bend	Black Creek	4/6/82
8910	Ten Sleep	WY	Worland	Ten Sleep Creek	8/27/84
1333	Tule	CA	Porterville	Tule	12/30/85
1388	Lee Vining	CA	Lee Vining	Lee Vining	11/4/81
3863	Lost Creek #1	CA	Burney	Lost Creek	1/26/82
9869	Goshen	IN	Goshen	Elkhart R.	4/18/86
9874	Mishawaka	IN	Mishawaka	St. Joseph	3/6/86
5244	Causey	UT	Huntsville	Ogden	7/23/81
6018	Causey	UT	Huntsville	Ogden	2/16/82
7490	Embrey Dam	VA	Fredericksburg	Rappahannock	7/10/83
7897	Benton	IN	Benton	Elkhart	10/30/85
9004	Embrey	VA	Frederickburg	Rappahannock	9/24/84
9761	Bainter Town	IN	Goshen	Elkhart	5/7/86

Table A. Continued

Project No.	Project Name	State	Nearest City	River	Date of Request for 401 Certificate
346	Blanchard	MN	Little Falls	Mississippi	12/3/85
1417	Kingsley	NE	North Platte	Platte	7/10/84
1835	Sutherland	NE	North Platte	Platte	7/10/84
2343	Millville	WV	Millville	Shenendoah	3/13/86
6459	Tar River	NC	Rocky Mount	Tar	1/31/85
2683	Elwha	WA	Port Angeles	Elwha	8/26/81
3721	Nooksack Falls	WA	Lynden	Nooksack	1/6/82
4221	Swift Creek	WA	Concrete	Swift	7/13/83
4376	Rocky Creek	WA	Marblemount	Rock Creek	10/27/82
4732	Applegate	OR	Ruch	Applegate	6/9/80
5090	Shelley	ID	Shelley	Snake	5/21/85
5305	Storm Ridge	WA	Index	Skykomish	7/14/83
5797	Star Falls	ID	Murtaugh	Snake	4/30/84
5915	Clear Creek	WA	Darrington	Clear Creek	2/2/83
6310	Barclay Creek	WA	Baring	Barclay Creek	5/5/82
6726	Lucky Chance	CO	Lake City	N.F. Henson Creek	10/17/84
9887	Horsetooth #1	CO	Fork Collins	----	1/24/86
10232	Turkey Creek	CO	Telluride	Turkey Creek	2/18/86
3701	Tieton	WA	Yakima	Yakima	7/26/83
3913	Thunder Creek	WA	Concrete	Thunder Creek	6/1/83
5264	Stone Creek Shellrock Creek	OR	Estacada	Stone/Shellrock	6/85
5993	Lime Creek	WA	Darrington	Lime Creek	9/23/82
6617	Silver Creek	WA	Sequin	Silver Creek	10/15/84
9948	Elkhorn	WA	Tacoma	Dosewallies	7/11/85
9710	Croghan Island	NY	Croghan	Beaver	12/20/85
9754	Rio	NY	Lumberland	Mongaup	10/20/85
9821	Ogdensburg	NY	Ogdensburg	Oswegatchie	12/27/85
9825	Ogdensburg	NY	Ogdensburg	Oswegatchie	3/28/86
3479	Rock Creek	CA	Stirling City	Rock Creek	10/7/83
5601	French Creek	CA	Berry Creek	French Creek	1/22/85
7090	Indian Creek	CA	Cresent Mills	Indian Creek	8/10/85

Table A. Continued

Project No.	Project Name	State	Nearest City	River	Date of Request for 401 Certificate
8142	Dynamo Pond	CA	Bridgeport	Green Creek	8/28/85
9758	Gold Hill	CA	Auburn	Placer	11/14/85
2748	Walters	NC	Canton	Pigeon	8/20/74
2785	Sanford	MI	Edenville	Tittabwassee	3/28/83
7425	Ross R.Barnett	MS	Jackson	Pearl	1/18/84
8862	Coffeeville	AL	Coffeeville	Tombigbee	10/17/85
8813	Coffeeville	AL	Coffeeville	Tombigbee	3/29/85
8435	Aliceville	AL	Pickensville	Tombigbee	3/29/85
8466	Warrior	AL	Eautaw	Black Warrior	3/29/85
8812	Gainesville	AL	Gaineville	Tombigbee	3/29/85
1494	Pensacola	OK	Disney	Grand	9/12/84
3218	Pike Island	OH/WV	Yorkville	Ohio	OH:9/23/82, WV:8/1/85
3490	Montgomery L&D	PA	Potter	Ohio	2/3/86
8990	Opekiska L&D	WV	Everettville	Monongahela	2/20/85
2494	White River	WA	Buckley	White	11/7/83
3725	Swift Dam	MT	Valier	Birch	9/1/83
4238	Race Horse Creek	WA	Maple Falls	Race Horse	12/27/82
4270	Boulder Creek	WA	Maple Falls	Boulder	12/27/82
4312	Canyon Creek	WA	Newhalem	Canyon	4/14/84
4412	Thornton Creek	WA	Newhalem	Thornton Creek	4/24/84
4435	Damnation Creek	WA	Newhalem	Damnation Creek	4/24/84
4628	Wells Creek	WA	Glacier	Wells Creek	11/2/83
5495	Dungeness River	WA	Clallum	Dungeness	4/16/84
5853	Olney Creek Falls	WA	Gold Bar	Olney Creek	12/22/81
6151	Cabin Creek	WA	Eldon	Cabin Creek	9/30/84
6287	Lena Creek	WA	Eldon	Lena Creek	9/12/84
6840	Tyler Creek	WA	Sequim	Dungeness	10/15/84
6895	Fisher Creek	ID	McCall	Fisher Creek	9/6/83
7076	Dallas Dam North Fishway	WA	Dallas	Columbia	1/2/85
7393	Lower Bagley Creek	WA	Glacier	Lower Bagley Creek	9/13/84
8285	Noisy Creek	WA	Concrete	Noisy Creek	3/13/84
8515	Hope Creek	OR		Hope Creek	6/21/84
2752	Kootenai	MT	Troy	Kootenai	3/80
4158	Skookum Cr.	WA	Acme	Skookum Creek	6/83
8794	Falls Dam	CT	Seymour	Naugatuck	12/11/84

Table B. Pending hydropower applications where the state certifying agency acted on the request for certification beyond 1 year from receipt of request.

Project No.	Project Name	State	Nearest City	River	Date of Request for 401 Certificate	Date of Certifying Agency Action	
						Issued 1/	Denied
6984	Boulder Creek	WA	Marblemount	Boulder	12/20/82	1/9/84	
7022	Tiber Dam	MT	Chester	Marias River	1/21/83	5/14/84	
7099	Tiber Dam	MT	Chester	Marias River	2/7/83	5/14/84	
1962	Rock-Creek Cresta	CA	Pulga	Feather	11/4/79	12/8/81	
3581	El Portal	CA	El Portal	Merced	2/17/84		4/30/87
67	Balsam Meadow	CA	Fresno	Balsam Meadow	3/20/86	4/7/87	
3742	Aspen Park	CA	Bishop	Rock Creek	6/28/83		4/30/87
4669	Rancho Riata	CA	Bishop	Bishop Creek	6/17/83		4/30/87
5222	Garden Bar	CA	Meridian	Bear	5/24/85		4/30/87
6188	Red Mountain	CA	Big Pine	Red Mountain	7/82		4/30/87
6781	Rizzly Creek	CA	Belden	Rizzly Creek	8/9/82		4/30/87
7722	Long Canyon Creek	CA	Forest Hills	Long Canyon Creek	12/17/82	6/3/84	4/30/87
7723	Big Grizzly	CA	Forest Hills	Big Grizzly Creek	12/17/82	6/3/84	4/30/87
2615	Brassua Storage	ME	Brassua	Moose	12/16/85	2/13/87	
5928	Ithaca Falls	NY	Ithaca	Fall Creek	1/22/82	9/23/83	
9085	Great Falls	VT	Thetford	Ompompanoosuc	4/2/85		9/21/86
9194	Little Falls	NJ	Passaic	Passaic	5/16/85		5/5/87
3892	Thomson	NY	Thomson	Hudson	8/3/83	3/11/85	
4114	Lower Saranac	NY	Plattsburgh	Saranac River	8/31/81	9/26/83	
4244	Northumberland	NY	Northumberland	Hudson	8/9/85	9/8/86	
8433	Ball Mountain	VT	Jamaica	West River	4/19/84	10/1/85	
5276	Hudson Falls	NY	Bakers Falls	Hudson River	8/24/81		1/6/86
5971	Gonic Dams	NH	Rochester	Cocliceo	2/10/82	3/5/83	
6032	Mechanicville	NY	Mechanicville	Hudson River	2/12/82	4/15/87	
7860	Bethlehem Dam	NH	Bethleham	Ammoroosoc	11/27/85	12/27/86	
9706	Mechanicville	NY	Mechanicville	Hudson	12/20/85	4/15/87	
803	Desabla Centerville Hydro	CA	Magalia	Butte Creek and West Branch	7/24/84		4/30/87
1988	Haas-Kings	CA	Centerville	N.F.Kings River, Helms Creek, Rancheria Creek	11/1/84		4/30/87

Table B. Continued

Project No.	Project Name	State	Nearest City	River	Date of Request for 401 Certificate	Date of Certifying Agency Action	
						Issued 1/	Denied
3583	Horton Creek	CA	City of Los Angeles	Horton Creek	11/24/82		4/30/87
3741	Horsetail Hydro	CA	Bishop	McGee Creek	6/28/83		4/30/87
8160	Lewis Fork Creek	CA	Oakhurst	Lewis Fork Creek	4/13/83		4/30/87
6842	Wynoochee Dam	WA	Grisdale	Grays Harbor	1/8/85	6/9/86	
7633	Grant Lake	AK	Moose Pass	Grant Lake	1/2/85		4/24/87
7899	French Creek	ID	Riggins	French Creek	1/4/85	8/19/86	
8121	Deer Creek	ID	Banks	Deer Creek	12/14/83	5/31/85	
9073	Lavezzola Creek	CA	Downieville	Lavezzola Creek	3/21/85		4/30/87
9093	Downie Creek	CA	Camptonville	Oregon Creek	6/12/85		4/30/87
7383	Allison Creek	ID	Riggins	Allison Creek	1/15/85	5/12/86	
7589	Shingle Creek	ID	Riggins	Shingle Creek	12/18/84	6/26/86	
8133	East Fork Ditch	ID	Council	East Fork Weiser River	8/12/85	4/23/87	
9620	Panther Creek	WA	Stevenson	Panther Creek	10/21/85	2/9/87	
190	Pole Creek	UT	Roosevelt	Unitah	6/30/77	6/8/81	
596	Olmstead	UT	Orem	Provo	4/7/75	4/24/80	
1744	Weber	UT	Ogden	Weber	6/24/69	3/22/74	
3188	Pyramid	CA	Twin Bridges	Pyramid Creek	4/2/82	6/19/84	
3258	Pine Creek	CA	Bishop	Owens	2/3/83		4/30/87
3259	Paoha	CA	Lee Vining	Wilson Creek	4/29/82	8/14/86	
3862	Leclaire	IA	Leclaire	Mississippi River	4/15/83	12/10/85	
4369	Coon Rapids	MN	Coon Rapids	Mississippi River	5/1/84	7/26/85	
6907	High Falls	GA	Chappel	Towaliga	12/10/84	5/1/86	
7307	Tygart Lake	WV	Grafton	Tygart	5/83	12/11/85	
7399	Tygart Dam	WV	Grafton	Tygart	5/25/83	8/15/85	
533	Skagit River	WA	Diablo	Skagit	6/29/77	1981	
3459	Mason Dam	OR	Baker	Powder	1/10/83	11/14/85	
7276	Fall Creek	ID	American Falls	Fall Creek	9/84	4/23/87	
6962	Dunn & McCarthy	NY	Auburn	Owasco Lake	5/20/84	11/1/85	
9886	Valatie Falls	NY	Valatie	Kinderhook	11/14/85		4/24/87

Table B. Continued

Project No.	Project Name	State	Nearest City	River	Date of Request for 401 Certificate	Date of Certifying Agency Action	
						Issued 1/	Denied
9920	Scudder Falls	NY	St. Johnsville	Zimmerman	11/10/85	4/24/87	
2828	Lake Redding	CA	Redding	Sacramento River	4/1/80	11/23/81	
6167	Eltapom Creek	CA	Hyampom	Eltapom Creek	2/17/83	9/11/84	
8908	Maxwell L&D	PA	Centerville	Monongahela	1/15/84	12/30/85	
2971	Montgomery L&D	PA	Potter	Ohio	6/8/84	6/25/85	
6157	Hagmerman Hatchery	ID	Hagerman	Riley	10/27/82	7/15/84	
6568	Grave Creek	OR		Grave	10/19/84	3/3/87	
7300	China Creek	ID	Lucile	China	12/1/82	1/10/84	
7382	Lake Creek Hydro	ID	Riggins	Lake	8/27/84	7/3/86	
3246	Mississippi L&D 26	MD	Alton	Mississippi R.	9/18/82	12/27/83	
137	Mokelumme	CA	Mokelumme	Mokelumme R.	9/27/76	3/26/81	
2531	West Buxton	ME	Buxton	Saco R.	10/16/84	12/16/86	
5146	Hamilton St.	PA	Allentown	Lehigh R.	4/31/83	3/20/85	
6780	Deadwood	CA	Marysville	Deadwoods Cr.	10/13/82		4/30/87
7732	Mason Dam	OR	Baker	Powder	10/12/83	11/14/85	
2543	Milltown	MT	Milltown	Clark Fk.	10/18/85		5/8/87
2899	Milner	ID	Burley	Snake	1/27/84	9/30/85	
7941	Wallace Canyon Lr.	CA	Michigan Bluff	Wallace Canyon Cr.	12/17/82		4/30/87
1390	Lundy	CA	Bishop	Mill Cr.	4/1/81	11/22/83	
6017	Ten Mile Cr.	CA	Fresno	Ten Mile Cr.	11/20/81		4/30/87
6628	Fremont	OR	Granite	Lake/Lost Crs.	11/7/84	11/12/85	

Table B. Continued

Project No.	Project Name	State	Nearest City	River	Date of Request for 401 Certificate	Date of Certifying Agency Action	
						Issued 1/	Denied
588	Glines Canyon	WA	Port Angeles	Elwha	6/74	8/3/78	
6432	Tiber Dam	MT	Chester	Marias	6/80	5/14/84	
4515	Jacobson # 1	CO	Palisade	Colorado	1/82	3/21/83	
6730	St. Vrain Canal	CO	Lyons	St. Vrain Canal	1/81	9/23/82	
7276	Fall Creek	ID	American Falls	Fall Creek	9/84	4/23.87	
8178	Falls Dam	CT	Seymour	Naugatuck	1/84	4/1/85	
8714	Merrimack Village Dam	NM	Merrimack	Souhegan	9/26/84	10/15/85	
6902	Willow Is.	WV	Willow Is.	Ohio	3/20/85	4/10/87	

1/ Granted or Waived

Question 50: Is it the Commission's position that the regulations for implementing procedural provisions of the National Environmental Policy Act (40 C.F.R. Parts 1500-1508) promulgated by the Council on Environmental Quality are not binding upon the Commission in implementing its NEPA responsibilities. If not, why not? Please detail any responsibilities outlined in the CEQ regulations which the Commission interprets as not binding upon the Commission.

Answer: The Commission issued a notice of proposed rulemaking (NOPR) to implement the National Environmental Policy Act (NEPA) in 1979, following the promulgation of the Council on Environmental Quality (CEQ) regulations. This NOPR was never finalized. However, on May 14, 1987, the Commission issued a revised NOPR to implement NEPA. The NOPR, which did not address the issue of whether the Commission is bound by CEQ's regulations, proposed to adopt most of the CEQ regulations in 40 C.F.R. Parts 1500-1508, with some modifications to accommodate its statutory authorities and to reflect its practices.

The CEQ regulations state that they are binding on all Federal agencies for implementing the procedural provisions of NEPA "except where compliance would be inconsistent with other statutory requirements." The Commission believes that inconsistencies exist in several instances.

For example, the 1987 NOPR does not propose to adopt § 1501.2(d)(2) and the second sentence of § 1502.5(b) of the CEQ regulations, which encourage agency consultation with other entities prior to the receipt of project applications. The Commission believes these provisions conflict with statutory requirements such as section 10(a)(3) of the Federal Power Act, which requires that the Commission shall solicit recommmendations from pertinent agencies and Indian tribes "upon receipt of an application for a license." They also conflict with section 30 of the Federal Power Act, which requires the Commission to consult with Federal fish and wildlife agencies in making a determination on an application for an exemption for a small conduit hydroelectric facility and which also applies to exemptions for small hydroelectric power projects. The Commission's regulations at 18 C.F.R. § 4.38 require applicants to consult with Federal agencies as early as possible in their planning processes for hydroelectric power projects.

The Commission believes, in any event, that these statutory and regulatory provisions fulfill the intent of the CEQ provisions that those entities with expertise and approval authority be consulted during the planning stage.

STATEMENT OF

THE HONORABLE RICHARD H. BRYAN

GOVERNOR

STATE OF NEVADA

presented by

R. LEO PENNE
DIRECTOR, STATE OF NEVADA, WASHINGTON OFFICE

before

THE HAZARDOUS WASTES AND TOXIC SUBSTANCES SUBCOMMITTEE

SENATE ENVIRONMENT AND PUBLIC WORKS COMMITTEE

regarding

S. 1584 - THE AIRSPACE PROTECTION ACT

November 24, 1987

Mr. Chairman, members of the Committee, my name is Leo Penne and I am the Executive Director of Nevada's Washington Office. I am here today on behalf of Governor Richard Bryan of the State of Nevada to provide testimony on the Airspace Protection Act (S. 1584).

To begin with, the Governor would like to convey to the Committee his full support for this important legislation. We believe the legislation is not only timely, but, when enacted, will provide an opportunity for all to evaluate new airspace withdrawals and reclassifications proposed by the various branches of the military.

Clearly, the bill will provide a forum for open public discussion and analysis of new airspace withdrawals. Moreover, the legislation will allow the concerns of those most affected by changes in military airspace to be heard and considered. As you well know, those directly affected are the citizens that would be impacted by military overflights. Others who may be affected include the aviation community and the ranching and mining industries. In order to explain our strong support for this bill, we believe it is important to describe to the Committee the scope and presence of defense activities in our state, and to list some of the events that have changed military airspace in Nevada over the past decade.

Currently, Nevada hosts several major defense complexes including the Nellis Air Force Base and Range, the Fallon Naval Air Station, the Hawthorne Ammunition Depot and the Nevada Nuclear Test Site. In all, the Department of Defense and the Department of Energy control nearly four million acres of public land across the state.

In addition, during the past five years, Nevadans have seen the creation of two separate military Supersonic Operation Areas, one for the Air Force and one for the Navy. Together these two areas overlie some 6,800 square miles of public and private lands in Nevada. We have also seen the creation of a new low-level training route by the Strategic Air Command, and a new Military Operations Area of 900 square miles for the Oregon Air National Guard.

Beyond these airspace withdrawals, the Department of Defense is currently planning new land withdrawals totaling some 270,000 acres. These actions encompass the Groom Range withdrawal by the Air Force, and the Navy's expansion withdrawal of several air-to-ground bombing ranges.

Mr. Chairman, and members of the Committee, what is significant about all of these airspace and land withdrawals is that each of them was proposed separately and, for the most part, by different branches of the military. This piecemeal approach to defense planning has resulted in the perception that military resources are being duplicated. The resulting cumulative effect of these actions has also left nearly 40 percent of Nevada's airspace under military use and control.

The bill before you today will mandate that all proposed acquisitions of airspace for military use be subject to the requirements under Section 102 (2)(C) of the National Environmental Policy Act. We believe this legislation is necessary for the following reasons:

1) All new special use airspace actions will be subject to a cumulative effects analysis required under NEPA. This will provide the opportunity for local, state and regional analysis of new airspace withdrawals.

2) Under current federal regulations, the Federal Aviation Administration can approve certain forms of military special use airspace without complying with the provisions of the National Environmental Policy Act. The FAA now exempts proposals from environmental analysis for new airspace that would be 3,000 feet above ground level. We believe this arbitrary regulation -- the 3,000 foot rule -- fails to protect public health, wildlife, cultural resources and unique recreational opportunities. This bill will mandate consideration of all unique resources by requiring environmental review for every new military airspace proposal.

3) It has been our experience in Nevada that when the FAA authorizes an increase in special use airspace, this increase is simply added to existing military airspace without any provision for reviewing how the military is utilizing their present airspace. The bill before you specifically addresses this concern by requiring the FAA to review, and justify, use of all newly authorized airspace for the military.

4) We are concerned that the FAA has abdicated its responsibility concerning the creation of certain types of military special use airspace. For example, the FAA has allowed the military to designate airspace resulting in dangerous joint military and civilian use. In other words, the FAA has implicitly authorized special use airspace where small private aircraft can fly in the same airspace occupied by military aircraft flying at supersonic speeds. This is the situation with the Navy's recently approved Supersonic Operations Area in west central Nevada.

If any new proposals for this type of special use airspace were developed under this bill, the FAA -- rather than the Department of Defense -- would be required to examine and approve this type of special use.

5) Mr. Chairman and members of the Committee, last year the Nevada Legislature passed a Joint Resolution that urges the Congress to investigate the designation and control

of military airspace. The resolution further requests Congress to enact legislation enhancing public participation in the process of establishing special use airspace. Nevada supports Senator Reid's bill because it mandates a public review process as required under the National Environmental Policy Act. This is particularly important in the West, because most military overflights are conducted over public lands. It is almost impossible to effectively question federal decisions about our public lands and airspace without a formal public review process.

In conclusion, we would like to stress to the members of this Committee that the bill will enhance procedures for establishing and monitoring special use airspace allocated to branches of the Defense Department. It will assure that the FAA takes a leading role in making new decisions about airspace use, and will mandate compliance with the intent of the National Environmental Policy Act. Nevadans deserve full public participation in the management and use of our public airspace.

Mr. Chairman, members of the Committee, Governor Bryan would like to thank you for listening to his remarks on this important legislation.

TESTIMONY

BY

LYNN MUCHMORE

ASSISTANT SECRETARY FOR ADMINISTRATION
AND INTERGOVERNMENTAL RELATIONS
NORTH CAROLINA DEPARTMENT OF NATURAL RESOURCES
AND COMMUNITY DEVELOPMENT

BEFORE THE SENATE SUBCOMMITTEE ON

HAZARDOUS WASTE AND TOXIC SUBSTANCES

Washington, D.C.

Tuesday, November 24, 1987

I commend Senator Reid and this Subcommittee for the attention being given to special use airspace. My colleagues and I will be available as Senate Bill 1584 continues through the legislative process, prepared to share any information that you may find useful.

Eastern North Carolina officials have tiptoed through the 70's and 80's against a backdrop of intense conflict about the use of natural resources. Convinced that coastal beaches, estuarine waters, scenic and historical attractions, and similar seaside amenities should be available for human enjoyment and that access means roads, housing, and commercial development -- but mindful that the natural systems making up the coastal environment can be devastated by mindless growth -- the Governor and the General Assembly years ago crafted law that subjects potentially damaging development to early public scrutiny and to careful evaluation by regulatory professionals. The North Carolina Coastal Area Management Act and the state Environmental Policy Act create vital machinery that our citizens rely upon to assure that actions proposed by government or the private sector are systematically examined in an open process to expose their full implications for the human environment. Debate about such proposals is not only accepted in our state; it is expected. The years of vigorous dialogue have had a healthy effect upon state policy and have greatly refined the public's understanding of environmental consequences that run with human activity.

For the most part this progress at the state level has been complemented by federal agencies operating under the Coastal Zone Management Act and the National Environmental Protection Act. Remarkably, even the Army Corps of Engineers plays by the rules in our state, and our working relationship with that agency is good.

Thus the Federal Aviation Administration is a glaring exception. It simply excuses itself from the NEPA requirements that govern special use airspace decisions. We believe it does so illegally. And special use airspace decisions matter to eastern North Carolina.

In the past three years we have watched five separate proposals for military airspace expansion go to the FAA from three service branches -- the Navy, the Air Force, and the Marine Corps. Together they shadow a million acres of eastern North Carolina, affect four of the five fastest growing counties in the state, and directly impact Dare County, reputedly the fastest growing county in the nation. They funnel highspeed fighter traffic at low altitudes down a pristine national seashore; they take away airspace used by the state for marine fisheries, wildlife, and forest management activities; they jeopardize the viability of needed civil aviation routes by mixing military and civilian traffic in airspace lacking radar and communications services; they further antagonize an already irate citizenry fed up with broken windows, cracked plaster, and treetop confrontations with hot-dog pilots violating the military's own rules at near supersonic speeds, pilots who seem immune from disciplinary action unless some ordinary citizen who happens to have near supersonic eyeballs can get the number of the aircraft or discern what type it is and who it belongs to. In not one of these five cases has the Federal Aviation Administration recognized its legal obligations under the National Environmental Protection Act. North Carolina has been left to deal as best it can with the three service branches separately. And in these dealings we frequently seem to be regarded as some threat to national security, a characterization that is infuriating because we are a state traditionally supportive of a strong defense that accepts the need for training and readiness.

In the context of both federal and state commitments to carefully evaluate the environmental impact of proposed governmental action, and to provide a specific example, let me cite a request from the Navy to enlarge the restricted area at Stumpy Point, an enlargement we knew would provoke public protest. We asked for environmental documentation from the Navy. Our petition was brushed aside. Only when our Attorney General invoked the Freedom of Information Act were we given the Navy's environmental assessment. Here it is -- all one and one-half pages of it. It had never been circulated for administrative agency review. It had never been circulated for public review. It cavalierly dismissed the proposal as noncontroversial. It demonstrated no consideration of alternatives. It is pitifully inadequate, both procedurally and substantively, by any professional standard.

Who is accountable for such a response? We read NEPA regulations, and they indicate that the FAA is accountable. The Council on Environmental Quality in the Executive Office of the President interprets the NEPA regulations, and says that the FAA is accountable. That should be enough. But we are driven to this absurd extreme -- to support a Senate Bill that requires the Federal Aviation Administration to obey the law because someone in that agency wants to play games with the English language.

We are slowly forcing the service branches into a more conciliatory attitude. Recently we have had some productive discussions with the Navy. The Marine Corps has become more sensitive to NEPA requirements. But the problem demands recognition of cumulative impacts, and each service branch pursues its own objectives with little knowledge of or concern about proposals being made by its peers. The problem demands a comprehensive management plan for special use airspace in North Carolina, taking at once military needs, the current use of some three million acres already dedicated to military air training, and the economic and environmental factors that are considered in virtually every other governmental decision with significant effects. Only the FAA is in a position to remedy the confusion. And the FAA has so far refused to recognize any lead agency obligations.

Let me summarize our position:

The time when North Carolina airspace could be regarded as a "free good" available for preemption by the military at no cost to society is drawing to an end, overtaken by the intense competition for natural resource uses.

The means to manage that competition are in place, and are being applied with success to surface development, both on land and on the water. State and local government actions are subject to stringent state laws. One of the most important means of guiding federal action is the National Environmental Policy Act.

Practically speaking, the Federal Aviation Administration has voided NEPA requirements by ignoring the intent of Congress and violating federal regulations.

States cannot effectively compensate for FAA legal delinquency by negotiating with each service branch separately as airspace proposals appear. We are left without the protection promised in the National Environmental Policy Act.

Unless and until the FAA fully embraces NEPA and accepts NEPA responsibilities as a positive dimension of the decision process, citizen demands will grow more shrill and states will be driven to the courts for remedy. This latter option we would prefer not to exercise. Senate Bill 1584 seems to be the only available recourse.

Thank you for your attention and for this opportunity to press the interests of North Carolina's citizens.

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STATEMENT OF WEBSTER B. (DAN) TODD, JR.
SENIOR VICE PRESIDENT FOR GOVERNMENT AND TECHNICAL AFFAIRS
AIRCRAFT OWNERS AND PILOTS ASSOCIATION

REGARDING SPECIAL USE AIRSPACE

ENVIRONMENT AND PUBLIC WORKS COMMITTEE
SUBCOMMITTEE ON HAZARDOUS WASTE AND TOXIC SUBSTANCES
HONORABLE MAX BAUCUS, CHAIRMAN
TUESDAY, NOVEMBER 24, 1987

Mr. Chairman, I am Dan Todd, Senior Vice President of Government and Technical Affairs of the Aircraft Owners and Pilots Association (AOPA). We share your concerns regarding the designation and expansion of special use airspace (SUA), and we appreciate the opportunity to appear before this subcommittee.

AOPA represents the national aviation interests of 260,000 aircraft owners and pilots who fly general aviation aircraft for business and personal transportation. General aviation is the largest segment of airspace and airport users, comprising 98 percent of all U.S. civil aircraft, 96 percent of all pilots, and 85 percent of the annual civil aircraft flying hours. General aviation consists of more than 700,000 pilots flying more than 210,000 aircraft approximately 35 million hours a year. By comparison, U.S. air carriers operate only 4,370 aircraft and fly just 20 percent of the hours general aviation does on an annual basis.

As a result, our members are the chief beneficiaries of airspace safety and capacity improvements. For every airliner that takes off, 50 general aviation departures occur. For every airport served by an airline, general aviation serves 24. Clearly, our interest in airspace modernization is a continuing one. We want to ensure that what we receive for our tax-contributed dollars is a system that will assure safety and utility.

GENERAL AVIATION PERSPECTIVES

We have been concerned with the complex special use airspace issues facing the Federal Aviation Administration (FAA) airspace planners for years. Increased military requests for additional SUA and military training routes during an era of escalating civil demand for airspace, especially in the states of Nevada, Florida, South Dakota, and North Carolina, are of particular concern to us.

The airspace is a finite resource and according to FAA, the military services currently have allocated to them one million square miles or the equivalent of all airspace east of the Mississippi River. While the military currently controls almost one-half of the airspace, it represents less than 15 percent of the air traffic operations and eight percent of the aircraft used in the United States. In our experience, over-zealous expansion of SUA without sufficient environmental and civil user participation has resulted in reduced access to public airports and inefficiency in the national airspace system in the form of delays and indirect routing.

AOPA recognizes the importance of providing the military services sufficient SUA to maintain a high level of military preparedness. We realize that today's advanced military aircraft have outgrown some of the currently designated SUA areas. The deployment of more capable aircraft and technologically sophisticated ground and in-flight equipment has led the military to seek more usable airspace with both larger horizontal boundaries and expanded altitude designation to meet their training and proficiency requirements.

We and other civil airspace users believe that the military's legitimate needs can be met without jeopardizing the natural environment or unnecessarily restricting civilian air traffic. The current pattern of laws, regulations, and practices have permitted the development of some SUAs that are characterized by sporadic, inefficient use.

It is important to note that civil and military coordination of airspace use is only one part of the overall "joint use" issue that also includes the sharing of national airport resources. Adequate general aviation accommodation at airports in many metropolitan areas is at great risk. Prime factors involve moderate to severe congestion at major hub airports, the loss of privately owned public-use airports, lack of tiedown and/or hangar space at many existing general aviation and reliever airports, and many other considerations.

Some of these major metropolitan areas have military airfields which could accommodate some level of general aviation activity. Language in the Airport and Airway Improvement Act of 1982 required the Secretary of Defense to "...indicate the extent of which domestic military airports and airport facilities will be available for civil use." We feel the final study was somewhat superficial and would like to see another one broader in scope which would involve direct input from various national aviation groups.

AOPA has strongly advocated that the new Airport and Airway legislation require a new study. Such a study should provide for re-examination of DOD facilities previously studied and for additional ones; such examinations should be on-site and include participation by representatives from civil aviation organizations. These studies should require detailed analysis of airspace, ATC procedures, security, and airport landside issues. Additionally, the study should involve an assessment of possible civil sponsors for the civil facilities required on military bases. Any capital improvements required by a civil sponsor should be determined eligible under this law. Such studies should also consider any military claim that the military mission would be impaired by the commencement of joint-use operations.

RECENT ACTION ON SUAs

In March of this year, the United States General Accounting Office (GAO) identified the need for better, more comprehensive short- and long-range airspace planning by the Department of Defense. GAO agreed that to the greatest extent possible, DOD airspace planning information should be shared with the FAA, the affected states, and the civilian aviation community in order to promote cooperation and coordination among all legitimate national airspace users. As a result of the GAO recommendations, we believe optimum use of our airspace requires mutual understanding and more productive working relationships between all users and FAA. Past agency decisions have been characterized by a lack of public hearings or informal meetings with users, and the preliminary studies which are conducted are not normally made available to the public. GAO summarized its key findings as follows:

> A. "Primarily because airspace was more readily available in the past and less was needed, the services have not developed long-range plans defining airspace needs and how those needs will be met. For the most part, individual military units are responsible for initiating proposals for additional airspace on a case-by-case basis when airspace shortages are identified."

> B. "The services recognize that changes in this approach are needed and have initiated steps to improve planning. The Navy, in particular, has begun an effort to define, validate, and support its future airspace requirements. However, the other services have not committed themselves to such comprehensive, long-range planning, and there is no DOD guidance to ensure consistency and service coordination in future military airspace development"
>
> C. "FAA and several states have expressed the need for better airspace planning information from DOD. Some states view DOD's airspace planning as piecemeal and believe that their aviation and economic development planning is hampered by the lack of DOD long-range airspace planning. FAA officials stated that FAA could do a better job in allocating airspace and in avoiding future conflicts if DOD airspace planning information were available."

Partly in response to the March 1987 GAO report and AOPA concerns, both the military and the FAA have recently taken steps to establish better airspace coordination and planning. For example, in the FAA southern region, the military and the FAA have increased their efforts to meet with local communities and airspace users to discuss specific airspace needs and problems. One recent proposal to expand SUA in North Carolina met with a great deal of public opposition based on justifiable environmental and airspace access concerns. As a result, the Navy and FAA representatives have invited state, environmental, and civil aviation representatives to discuss the issue further before making a decision on the proposal.

As another example, in Florida, both the Miami and Jacksonville air traffic control facilities are hosting regular user meetings to address new and on-going SUA issues to ensure maximum airspace availability for all users. This is an excellent example of the kind of dialogue and cooperation that should be expanded to other areas.

To meet its long term planning needs, DOD has sent military task groups to the southern region to gather airspace activity data, discuss present and future airspace requirements, and to learn about the particular SUA problems facing the southern states. These task groups are the first in the field and are soon to be joined by other military representatives who will be reviewing SUA nationwide. The information compiled by these task groups will help the military identify specific environmental and user problems in each state. It will provide the data necessary to make more efficient use of existing airspace and develop comprehensive national airspace plans for the future.

NATIONAL FAA/DOD PLANNING

The Federal Aviation Act of 1958 outlines FAA responsibility for safely and efficiently managing the nation's airspace to meet the needs of all users, both civil and military. Although FAA headquarters has final approval authority for airspace proposals, they are initially reviewed by FAA regional airspace managers. These FAA representatives consider the effects of a proposal on the local user communities, make appropriate recommendations to their military counterparts, and then circulate a proposal for public comment. In addition, military services' regulations require that certain proposals, such as those for airspace below 3,000 feet or those involving supersonic flight below 30,000 feet, comply with the National Environmental Policy Act (NEPA). This act requires that the military prepare environmental impact statements that assess the potential environmental impacts of proposed actions and a detailed analysis of all reasonable alternatives.

Statements in response to the recent GAO investigation by FAA representatives indicated that historically poor DOD planning causes both DOD and FAA to make decisions on individual airspace proposals that do not always serve the future needs of the airspace users. Air Force and Navy representatives concurred and stated that "comprehensive airspace planning has not been occurring primarily because airspace matters have not been a high priority in DOD." However, as stated previously, both the FAA and the DOD are taking action to improve airspace planning in both the short- and long-term.

AOPA believes that each state has a role and should be included in the SUA planning process. However, it is vital that the FAA, military, state representatives, and civil users work together to gain an understanding of one anothers airspace needs in order to make responsible decisions on SUA issues. AOPA encourages the states to support local user forums where all airspace users can contribute to solving today's complex SUA problems. As military and civilian airspace users have built stronger working relationships based on a mutual understanding of naturally differing needs, each side has seen the benefits of cooperation.

One recent example of the benefits that have come from cooperation during the airspace planning process is evident in the FAA Great Lakes region. Initially the United States Air Force (USAF) discussed its plans to alter the Chippewa military operations area (MOA) in Michigan with FAA regional representatives, as well as air traffic facility airspace managers. However, the subsequent circulation of the proposal drew strong opposition from state governmental officials and local pilots. The FAA Great Lakes regional representatives responded promptly by providing the state, civil pilots and military officials the opportunity to meet and resolve their conflicts with one another in an informal manner. The result was a mutually acceptable alteration of the USAF proposal which now provides the military with adequate airspace in which to meet their essential defense responsibilities without unneccessarily restricting the flow of civilian aviation.

The responsibility of resolving SUA problems should remain at the FAA regional level where SUA conflicts can be resolved with the guidance of the regional airspace experts. The FAA regional managers are familiar with local terrain characteristics, air traffic control requirements, airline and unscheduled carrier needs, general aviation activities, and environmental concerns. These airspace experts, working closely with state and other user representatives, can respond to meet changes in the local environment.

The FAA regional officials have a close relationship with national FAA and Department of Defense (DOD) airspace planners. The airspace managers at both FAA and DOD headquarters have begun to provide the regional managers with the support and guidance necessary to promote a national system of efficient shared use of our national airspace resource. These individuals are able to evaluate the cumulative effects of local airspace programs on the national airspace plan and provide guidance to ensure that all airspace is used with the highest level of efficiency.

PROPOSED LEGISLATION

We support Senator Reid's efforts to open the airspace process to the full aviation community. AOPA fully supports the bill's designation of the FAA as the lead federal agency and the requirement for at least semiannual reviews of continuing SUA designation.

We agree that the aviation community needs to be part of the SUA designation process. However, section one of the bill that would define expansion of special use airspace as any change in physical dimension, change in the activity or change in airspeed or type of aircraft is unnecessarily restrictive and does not permit the military services sufficient flexibility to satisfy their important training needs in a practical and cost-effective manner. The military must be free to change the characteristics of operations in SUAs and change the type or operation of aircraft mixed together in order to achieve efficient use of their equipment, personnel and allocated airspace. We suggest that section one be rewritten to emphasize that proposed new SUA or significant modification or expansion of existing SUA must go through an "open" approval process that is administered by FAA and is available to the public.

SUMMARY

Improved short- and long-term airspace and airport planning is critical today due to increasing demand for airspace and access by all users. Coordination among the military services and with the civilian airspace users, primarily the FAA, state governmental agencies and civilian aviation users, must be a priority in order to achieve efficient joint use.

The FAA must demonstrate stronger leadership and promote open communications among airspace users as they work toward the development of an efficient, safe, and cost-effective national policy for special use airspace. This can be accomplished by ensuring that the military services develop a comprehensive DOD airspace plan that will validate their requests and designations. It will also require that the FAA and DOD keep their plans current and apply them at both the federal and state level. Finally, it is essential that the FAA as the lead agency share all requests and planning data with the public and civil users in order to achieve equitable and efficient use of the nation's airspace.

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Testimony of Laurens Silver, Staff Attorney,
Sierra Club Legal Defense Fund before the
Hazardous Waste and Toxic Substance Subcommittee
of the Senate Committee on the Environment and
Public Works

November 24, 1987

The Sierra Club welcomes this opportunity to testify in favor of Senator Reid's proposal to require compliance with the National Environmental Policy Act with respect to the designation of Special Use Airspace by the Federal Aviation Administration. The Sierra Club is in favor of this legislative proposal, for it is intended to correct a longstanding problem that has produced much frustration and anger on the part of both users and residents of both public and private lands throughout the United States. I believe that the attached articles will demonstrate the widespread dismay and concern that has appeared throughout the country with respect to the ever increasing military use of civilian navigable airspace.

The Sierra Club has been besieged by members complaining of military aircraft noise, including repeated sonic booms, over public lands, including national parks, wilderness and wilderness study areas, national wild and scenic rivers. This military noise not only disturbs those who use such areas for the purpose of enjoying a wilderness experience free of the noises and disturbance of an urban environment, but it also interferes with use of those public lands in other ways as well. Pack animals have been startled by military airplane noise, including sonic booms, and equipment, as well as passengers, have been injured. However, most seriously of all, there have not been environmental studies to determine the impact of aircraft noise on the reproductive physiology of birds and mammals, and it is currently not known what effects frequent and repeated disturbances by military aircraft have on the wildlife resources of our public lands, including migratory waterfowl.

Currently, when the military want to use airspace over public lands (or private lands) for training exercises on a regular, sustained basis, the proponent agency applies to the FAA for designation of Special Use Airspace. This will commonly involve a request for designation of a Military Operations Area, where military training flights can be conducted within certain specified vertical limits and within certain lateral boundaries. The process is typified by what happened in connection with the designation of the Hart MOA by FAA earlier this year.

The Hart MOA extends over 100 square miles of the public and private lands in northeastern Nevada, southeastern Oregon, and northeastern California, including two national wildlife refugees and eight Wilderness Study Areas. The FAA action approving that MOA authorizes 3,500 military training exercises per year at high speeds, during 3 days per week on the average, four to six hours per day. These missions will involve training low altitude intercepts and air combat tactics and will have a maximum of 20 planes per sortie. These operations will normally take place between 7:30 a.m. and

4:30 p.m. The MOA will be available for military use 7 days per week, 4 weeks per month, 12 months per year. The MOA will have a lower level or floor at an elevation of 11,000 feet above mean sea level (MSL), and extend to an upper boundary, or ceiling of 18,000 MSL.

Within the boundaries of the MOA as designated by FAA are the Hart Mountain National Anteleope Refuge, the Sheldon National Wildlife Refuse, and the following Wilderness Study Areas:

Massacre Rim (Nevada)
High Rock Canyon (Nevada)
East Fork High Rock Canyon (Nevada)
Sheldon Contiguous (Nevada)
Catnip Mountain (Sheldon National Wildlife Refuge)
Swan Lake (Sheldon National Wildlife Refuge)
Round Mountain (Sheldon National Wildlife Refuge)
Virgin Creek (Sheldon National Wildlife Refuge)

As a result of the extensive concerns expressed by the public concerning the airspace proposed for designation as Hart MOA, the FAA held "informal airspace meetings" at Lakeview Oregon and Sparks Nevada in late 1986 "to solicit additional *aeronautical* comment." Nearly 280 people attended these two meetings and expressed "environmental" rather than strictly "aeronautical" concerns.

During the course of its consideration of the special use airspace proposal for designation of the Hart MOA, the FAA received comments opposing the designation from members of

Congress, the affected counties, members of the Nevada legislature, U.S. Fish and Wildlife Service, the Bureau of Land Management, local citizens, and representatives of environmental groups, as well as civilian pilots and operators of local airports. By letter dated July 29, 1986 the Department of Interior, Bureau of Land Management wrote the FAA, opposing the designation of a Hart Mountain MOA without an environmental assessment or EIS:

> "We have some concerns over the potential environmental impacts that an expanded military aircraft operating area could cause on the public land resources that we are responsible for managing. Specifically, such aircraft operation could have adverse impacts on wildlife, including migratory water fowl using several large lakes and marshes in the area. There are also potential adverse impacts on livestock grazing, on recreational uses such as hunting, fishing, and backpacking, and on local inhabitants in the area. The proposed operating area includes two Wilderness Study Areas (WSAs), the Massacre Rim WSA and the Sheldon Contiguous WSA. We suggest that these potentially impacted resources should be addressed in the environmental analysis for this proposal."

The FAA prepared no environmental assessment, FONSI, or EIS in connection with the proposal of the Air Force for designation of special use airspace as the Hart MOA. The FAA referred all agency and citizen concerns concerning the environmental effects of any special use airspace designation to the military agency.

The Air Force, without preparation of an EA or any other environmental document forwarded to FAA, determined its special use airspace proposal was categorically exempt under its own NEPA guidelines and that therefore no environmental documentation was necessary. The FAA conducted no review of the determination of the Air Force that the environmental effects of the proposed special use airspace action were so insignificant it qualified for categorical exemption. The FAA relied on the Air Force "certification" of NEPA compliance and made no independent assessment, during the course of its consideration of the proposal for designation of the Hart MOA, of the environmental effects of such designation. Despite its exclusive authority to designate and control air space, the FAA did not make its own evaluation of the environmental issues relating to the designation of the Hart MOA as Special Use Air Space and did not take responsibility for the scope and content of any environmental assessment or the Air Force's determination in this case that no environmental assessment need be prepared.

It is the policy of the FAA that compliance with NEPA is the responsibility of the proposing-user agency. The FAA takes the position that it does not consider the environmental implications of its designations. That is solely the task of the user agency. It does not even review any environmental assessment prepared by the using agency, if there is one. See May 15, 1987 letter of Robert L. Brown, Northwest Mountain Region, FAA to Laurens H. Silver, attached as an exhibit to this testimony. In its decision approving the designation of the Hart MOA, FAA made its position clear. It stated:

> Compliance with the provisions of the National Environmental Protection Act are [sic] the responsibility of the military service making the proposal. Therefore, comments relative to environmental concerns (noise, pollution, quality of life, etc.) were forwarded to the Director, Environmental Planning for the Tactical Air Command at Largley Air Force Base, Virginia.

The public concerns for the quality of the environment below the proposed Hart MOA fell on deaf ears. The informal airspace hearings held by the FAA were solely addressed to aeronautical concerns, and although environmental complaints and concerns were voiced, FAA paid them no heed. As for the Air Force, it obviously paid such comments no heed, for it had already determined, prior to the informal FAA meetings held in July and September, 1986, that its MOA designation proposal would receive no environmental study. By March 24, 1986, the Air Force had already submitted a statement to the FAA certifying that it had 'complied' with NEPA in connection with its proposal.

There is something wrong with a process that so completely ignores the environmental concerns of citizens with respect to actions that so profoundly affect the use of lands below navigable airspace. It must be the responsibility of the designating, decision making agency, the FAA, to take into account the concerns of affected citizens. It should be the responsibility of the FAA to see that adequate environmental documentation is prepared and that it accompanies the proposal throughout the agency review process. Such is currently not the case, and FAA is completely indifferent to the environmental concerns of citizens upset by the military use of civilian navigable airspace.

Senator Reid's proposed legislation is intended to remedy this problem. The Sierra Club urges that it be favorably reported by this Committee to the Senate.

HYDRA-CO

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David R. Bristol, P.E.
Vice President
Hydro Development

December 8, 1987

Senator Max Baucus, Chairman
Subcommittee on Hazardous Waste and
Toxic Substances
Senate Dirkson Building, Room 458
Washington, DC 20510

SUBJECT: Senate Bill S.1792

Dear Senator Baucus:

I am writing today to provide comments on the proposed Senate Bill S.1792 and to provide additional information to the subcommittee on Hazardous Waste and Toxic Substances. HYDRA-CO Enterprises Inc. has been involved with a number of hydroelectric projects as developer, owner and operator. We believe that each of these projects have been developed in an environmentally responsible manner working with all of the appropriate state and federal agencies. We currently have in excess of 100 megawatts of hydroelectric projects on line and are working on an additional 20 megawatts of projects in the licensing process.

HYDRA-CO opposes Bill S.1792 and supports the FERC Order 464 defining time limits for state agency certification on water quality conformance under the clean water act.

The attached comments are being provided for your information and we respectfully request that they be inserted into the public record for Senate Bill S.1792.

Very truly yours,

David R. Bristol

David R. Bristol
Vice President
Marketing/Operations

DRB:mjr

Attachment: Comments to Senate Bill S.1792

Comments

to

SENATE BILL S.1792

by

HYDRA-CO Enterprises, Inc.

December 9, 1987

Historically, many of the states have taken an inordinate amount of time to make a decision on issuing a 401 water quality certificate for hydroelectric projects. Under the Federal Clean Water Act, authority has been delegated to state agencies to determine if federally permitted projects will conform with applicable water quality standards. It is my understanding that the simple obligation of the state under the section 401 water quality certification program, the state is to make a determination as to whether or not the project will conform with applicable water quality standards.

It has been our experience that the state agencies do not issue 401 water quality certificates based only on water quality. In our experience over the past six years, the state agencies have used dam safety and fishery issues as reasons to refuse to issue a water quality certificate. By of way of examples, the following particular experiences are projects in which HYDRA-CO has been involved:

1. Windsor Locks Hydroelectric Project, FERC 8404. The initial request for 401 certification on March 29, 1984. This request was forwarded to the Department of Environmental Protection ("DEC") along with a copy of a complete FERC license application which provided detailed water quality information. None of the subsequent comments from the agency addressed water quality or questioned the water quality, only fishery issues were identified. Consultation with the U.S. Marine Fishery Service, U.S. Fish and Wildlife, the Connecticut Salmon Commission and the Department of Environmental Protection ("DEP") were conducted over the ensuing three year period. As of November 7, 1985, the State of Connecticut DEP said "the resolution of the fishery issues will allow the department to initiate processing your request for a water quality certification". To this date there has been no action taken on the 401 water quality certification. See Exhibits I and II respectively.

2. Woods Falls, FERC 8763. The Woods Falls 401 water quality certificate was requested on August 6, 1986 subsequent to filing full license application to the FERC, subsequent studies resolved all of the water quality issues. However on August 5, 1987 the NYSDEC issued a letter stating that the 401 water quality certificate was being denied without prejudice. Even though correspondence indicated that the water quality issues were resolved, the DEC denied the water quality certificate. See Exhibits III and IV respectively.

There is no question that the state environmental agencies have the right and obligation to review and comment on all environmental aspects of hydroelectric projects. However it is inappropriate for the states to use the mandatory requirements for a 401 certificate to achieve non-water quality related issues.

It is clear that it is not water quality certificate that poses a time constraint on the issuance of a 401 water quality certification, but rather the numerous ancillary issues.

An overall environmental quality review of the hydroelectric projects is done by both state and federal agencies as noted in the Windsor Locks case there are at least 4 primary agencies involved in the fishery issues alone. In order to balance the issues between these single interest resource agencies, it is necessary that the FERC balance what constitutes the best adapted project. This includes an assessment of the project for the adequate protection, mitigation, and enhancement of fish and wildlife and for other beneficial uses, including irrigation, flood control, water supply, and recreation and other purposes.

The Sections 101-102-103 of Bill S-1792 that force FERC compliance with NEPA regulations in Senate Bill S.1792 are also unnecessary. The FERC has, for many years, satisfied the NEPA obligation through regulations that are as good or perhaps better than the Counsel on Environmental Quality NEPA Regulations. The FERC's obligation under the Federal Power Act has always included environmental review as well as economic feasibility, engineering standards and safety. We believe that there is no further legislation necessary to adequately address the environmental review, engineering safety or economic feasibility of hydroelectric projects. This authority and obligation is clearly vested under the Federal Power Act in the FERC.

It is in the best interest of this nation to protect its existing renewable energy resources and to develop new environmentally responsible projects. Hydroelectric power is one of the nation's best sources of renewable energy but the hydroelectric industry is being continually faced with changing requirements and regulations that continuously increase the length of time and cost of administrative process that achieves nothing for the environment. HYDRA-CO Enterprises Inc. respectfully urges this Committee to resist adding, yet, another layer of complexity and jurisdictional conflict to hydroelectric projects affected by this bill.

TESTIMONY ON

SECTION 104 OF S.1792; THE OFFICE OF ENVIRONMENTAL QUALITY AUTHORIZATION ACT OF FY 1987 - FY 1989

BEFORE THE

SENATE ENVIRONMENT AND PUBLIC WORKS SUBCOMMITTEE
ON HAZARDOUS WASTES AND TOXIC SUBSTANCES

by

G. HOWARD VAN NOY
VICE PRESIDENT - ENGINEERING SERVICES
THE MONTANA POWER COMPANY

NOVEMBER 24, 1987

Mr. Chairman and Members of the Committee:

My name is G. Howard Van Noy, Vice President - Engineering Services of The Montana Power Company (MPC). My comments address proposed Section 104 of the bill to authorize appropriations for the office of Environmental Quality for fiscal years 1987, 1988 and 1989.

As drafted, this section would grant State and Interstate Water Pollution Control Agencies one year from the date of its enactment to satisfy the certification requirement provided for in Section 401 of the Clean Water Act (33 U.S.C. § 1341(a)(1)). As written, Section 104 would apply even though (1) more than one year had elapsed since a state certifying agency had received a certification request and the state had neither certified nor specifically denied certification or (2) the state agency had either issued water quality certification or denied certification, but the issuance or denial occurred more than one year after state receipt of the request.

Obviously, this bill was introduced to counter the effect of the Federal Energy Regulatory Commission's (FERC's) Order No. 464, which interpreted Section 401 of the Clean Water Act to mean that a certifying agency had one year from the date of actual receipt of a request for water quality certification to either deny or grant the certificate request. If the certifying agency did not grant or deny the request within the one year time period, certification would be deemed waived. In the order, FERC also ruled that with regard to pending license applications which did not yet have Section 401 certification, FERC would notify the appropriate certifying agencies that it would deem certification to be waived one year after the date the certifying agency received the certification request. So that FERC's determination would not seriously compromise a certifying agency's ability to provide input on water quality issues, FERC allowed the affected agencies to submit their recommendations and comments on a license application concerning water quality. In its experience, MPC has found that FERC gives substantial deference to an agency's comments on water quality issues. Therefore, though in a particular pending case an agency may not have the plenary authority to deny or grant a 401 certificate request, through FERC's order it still has the very real ability to control water quality conditions in a license or amended license. Further, for future certificates state agencies still have the full year from receipt of the certificates to grant, deny or waive the requests.

Section 401(a)(1) of the Clean Water Act states as follows:

> If the State, interstate agency, or Administrator, as the case may be, fails or refuses to act on a request for certification within a reasonable period of time (which shall not exceed one year) after receipt of such request, the certification requirements of this subsection shall be waived with respect to such Federal application.

In Washington County Hydro Development Associates 28 FERC 61,341 (1984), FERC ruled that the one year waiver period commences when the certifying agency finds the request acceptable for processing even though FERC explicitly recognized that the plain meaning of the words "receipt of such request" and the legislative history (citing statement of Representative Edmondson during House Floor debate on the Clean Water Act) supported the interpretation that the one year period should be considered as commencing on the date the certifying agency actually receives a certification request. FERC's Order No. 464 rectifies its questionable decision in Washington County.

A troubling aspect about the proposed bill is that it could allow extended review of certification requests in cases in which more than one year has passed since the certifying agency had found the request acceptable for processing. For example, assume a state agency received a certification request on January 2, 1986 and on January 9, 1986 found the request acceptable for processing. Assume further that by January 9, 1987 the agency had not yet granted, denied or waived the certificate and, in fact, the agency did not anticipate any action on the certificate for some time. Under the proposed bill, this state agency could still conceivably act upon the certificate, even though in doing so it would be violating the most liberal interpretation of Section 401(a)(1) of the Clean Water Act. This result contravenes the letter and spirit of Section 401(a)(1). If this bill did not intend this result, then the intention should be made clear and not become subject to interpretation.

Another problem with this proposed bill is that for particular pending license applications it grants an additional year from its enactment to issue, deny, or waive a certificate. Together with the year that the bill assumes has already passed, this would give a state agency a minimum of two years to act on a certificate. Certainly, water quality is important, but so is a dam that is structurally sound. The intent of Section 401(a)(1) was to give states an opportunity to control the destiny of the waters that lie within their boundaries, so long as the states did not abuse this important responsibility by unreasonably delaying the certification process. This proposed bill codifies unreasonable delay. In so doing, it does change the basic intent of the 401 certification process and the basic thrust of the Clean Water Act and the Federal Power Act. Therefore, if this Subcommittee firmly believes that the Congress should pass a law to rectify what some perceive to be FERC's inequitable order, then at least the Subcommittee should present a bill that gives the certifying agencies something less than a year from the date of the enactment of the legislation (maybe six months) to pass on a certificate. The public and those who have applied in a timely manner for certification have a right to expect that the agencies will also act in a timely manner.

Consideration of a 401 certificate request in a timely manner has become very important to MPC. Currently, MPC is in the process of obtaining for its Milltown project all of its permits, including the 401 certificate. MPC has followed all appropriate procedures and has worked diligently with the state agencies to secure its 401 certificate, even though FERC's order No. 464 did not require MPC to get its 401 certificate. MPC filed its 401 certificate application in October of 1985 and has just now received a draft certificate for Phase II of its project. MPC is pleased to have finally received its 401 draft certificate because Milltown dam needs to be fixed to rectify fundamental structural problems. In the Milltown case, MPC must fix the structural problems, yet this proposed bill would allow a state agency significant additional time to ponder water quality issues. In the Milltown case, this additional time is unnecessary and unreasonable.

Finally, MPC believes that the Subcommittee should act carefully to avoid the following situation: Suppose a license applied for a 401 certificate and, because of FERC's order No. 464, received in March, 1987 a license or amended license without a 401 certificate. Suppose further that the licensee has now begun construction at its project. Under the proposed bill, a state agency would still have the ability to impose 401 conditions on the project or deny the issuance of a certificate. That a licensee who is under construction would have to wait for a 401 certificate, or even worse would have to wait for a certificate to only have the agency ultimately deny it hardly seems fair. Surely, the bill did not intend this result, but one cannot be certain considering the bill's broad language.

In summary, MPC believes that this proposed bill is unnecessary because under FERC's Order No. 464 the affected agencies have had the ability to make recommendations to FERC on relevant water quality concerns. If the Subcommittee still believes the proposed bill has merit, then the committee must address the bill's infirmities, some of which have been discussed in these comments.

MPC thanks the Subcommittee for this opportunity to comment.

Respectfully submitted,

The Montana Power Company

By: G. Howard Van Noy

G. Howard Van Noy
Vice President - Engineering
Services

mpm0045ks

Senate Bill 1584

WRITTEN TESTIMONY

BY:

GARY R. NESS
Director
North Dakota Aeronautics Commission

For the Senate Subcommittee of
Hazardous Waste and Toxic Substances

December 1, 1987

Senate Bill 1584

I thank the Committee for the opportunity to submit this testimony.

I'm the Director of the North Dakota Aeronautics Commission. Our state, as many of our sister states, has several special use airspace areas within its boundaries. We have two USAF airbases located at Minot and Grand Forks and a very active Air National Guard squadron based at Fargo. The special use air space is depicted on the attached air map of the state. As you can see, the MOA's impact our airspace. Thus, our interest in Senate Bill 1584 is self explanatory.

The main thrust of 1584 is, in my view, contrary to aviation and it's direction. The concern that I have is that it interjects, with more impact, a Federal Agency (EPA) into the loop that will not have the expertise and knowledge of aviation uses and needs. I will not argue the good EPA has done in the past, however, it has dealt in issues that fit it's mandate. The aviation assessment process is best served in the infrastructure that exists within the military and DOT/FAA. However, DOT/FAA has to become more responsive and sensitive to state and local concerns inthe process, which this bill does address.

I know that some states have supported this action. It is apparent that this support comes from the lack of input requested by the military or DOT/FAA by the states.

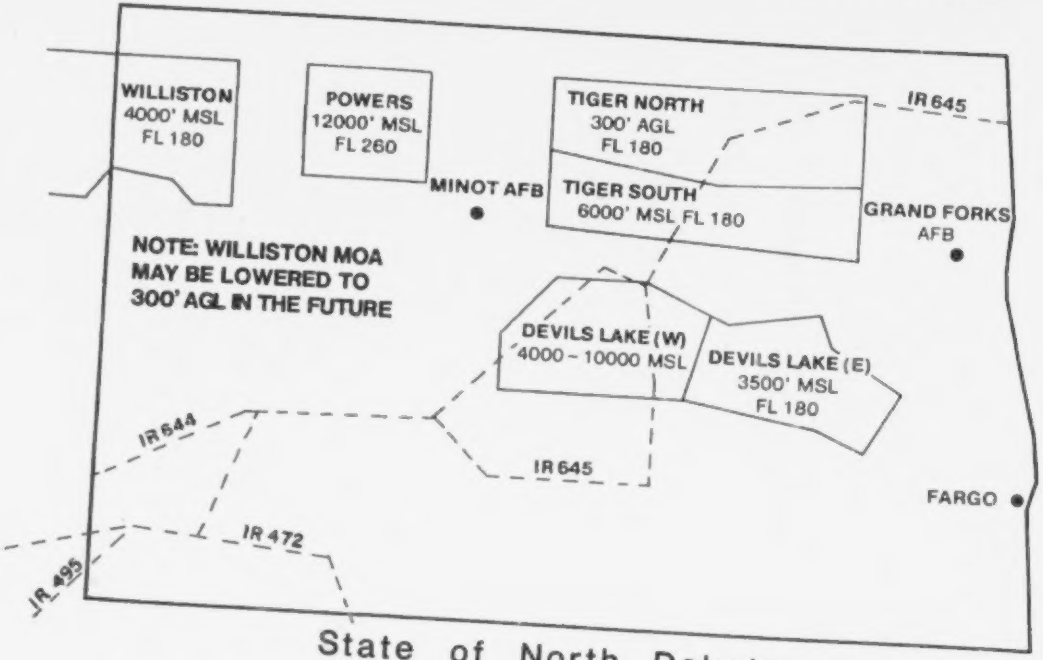
I strongly suggest that the EPA involvement not be increased beyond their involvement now, in this action. The red tape, time and manpower expended to make the studies would take too many resources from EPA's mandated duties in toxic waste and hazardous waste enforcement action that are far more important to the well being and future impact to our nation than the special use airspace area evaluations. To limit the impact of the state's affected by special use airspace, the states themselves should be inserted into the loop for approval, not increased EPA action.

The states have the knowledge and expertize to evaluate their airspace requirements and the impact of such areas and are much more sensitive to the effects than any federal agency without an aviation interest.

In closing, I strongly recommend that this legislation be tabled or killed in Committee or rewritten, or amended to put the interest of states into the process. Aviation is ruled, regulated and legislated enough within its infrastructure and does not need additional federal agency input.

Thank you for your time and consideration.

SPECIAL USE MILITARY AIRSPACE



State of North Dakota

Prepared by:
North Dakota Aeronautics Commission
Box 5020
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George M. Ochenski
journalism, politics
natural science

P.O. Box 689
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November 23, 1987

TESTIMONY ON S. 1792

Mr. Chairman and Members of the Committee:

For the Record, my name is George Ochenski, and I am a resident of Helena, Montana. I am submitting the following testimony in support of S. 1792.

This legislation is beneficial and necessary. Clarification of the Federal Energy Regulatory Commission's obligations vis-a-vis the National Environmental Policy Act will help to alleviate many of the problems that can arise when new, or rebuilt, energy projects are addressed by both state and federal agencies.

In Montana, our two areas of greatest concern are the Marias River, below Tiber Dam, and the Milltown Dam on the Clark Fork River.

The Tiber Dam has created an excellent tailwater salmonid fishery for the first 20 miles of the Marias below Tiber Dam. The state is currently proposing upgrading the classification from B-2 to B-1 status for this stretch of river. Concurrently, FERC is considering three competing applications for hydroelectric facility siting at Tiber Dam. It is vitally important to the people near the Marias that the least impact, most environmentally-conscious facility be installed. Why? Because if the trout fishery of the Marias is destroyed through poor planning or overly-large generation projects, the closest similar fishery is nearly one hundred miles away. Family recreation for fishing, floating, and all the various enjoyments possible from a healthy salmonid fishery could be severly limited or lost entirely without proper adjudication of environmental values by FERC.

On the Milltown Dam, the situation is different, but similarly critical. The dam itself is ancient, built in the early days of this century. Reconstruction of entire sections of the structure is considered mandatory for structural integrity of the dam. This situation is complicated by 6.5 MILLION tons of toxic sediments stacked up behind the dam. These sediments were flushed down by the river during nearly a century of mining and smelting activities in Butte and Anaconda, 100 miles upstream. The sediments contain enormous amounts of arsenic, lead, cadmium, copper, zinc, and a plethora of other metals associated with copper mining and smelting. So serious is this toxic pollution, that the dam is designated a Superfund site by the EPA.

There can be no doubt that this bill will help to set priorities where the dam reconstruction and Superfund activities coincide.

Montana needs the passage of S. 1792. Not only in regard to FERC and NEPA, but also as the bill addresses the concerns of state 401 certification on FERC projects. FERC ruled previously that if a state had not issued a 401 within one year of application for same, then state special conditions on 401 certifications were no longer valid. That ruling holds the promise of disaster for state attempts to preserve and enhance our streams and rivers, and treads heavily on states' rights. S. 1792 attempts to address this issue in a straightforward and constructive manner.

I close now, and thank you for your consideration of this important bill.

Before the
UNITED STATES SENATE
Committee on the Environment and Public Works
Subcommittee on Hazardous Wastes and Toxic Substances
Hearings on Senate Bill 1792

Comments of
Pacific Gas and Electric Company

Pacific Gas and Electric Company is an operating public utility corporation organized under the law of the State of California. It furnishes electric and gas service to approximately 3.8 million commercial/industrial and residential electric customers in northern and central California. It also supplies wholesale electric energy to a number of customers in the western United States.

A significant portion of the electricity provided to its customers is generated by the hydroelectric powerplants built and operated by the company under federal license. PG&E currently holds 29 major licenses, including 68 powerhouses with a total capacity of over 3900 MW. In an average year, these facilities generate about 12,700 Gwh, or 20% of PG&E's generation.

As a major developer and operator of hydroelectric facilities, PG&E is interested in any legislation affecting the regulation of this industry. Senate Bill 1792, sponsored by Senator Max Baucus, chairman of this subcommittee, is of particular concern because of its potential to extend the substantial delays that have already been experienced in the processing of some applications for hydroelectric licenses before the Federal Energy Regulatory Commission. As a member of the National Hydropower Association, PG&E reviewed and concurred with the testimony presented by NHA.

As proposed, S. 1792 would extend by one year the deadline for state agencies to act on pending requests for water quality certification under Section 401 of the Clean Water Act. The bill is directed to approximately 190 license applications for which requests for certification were pending for over one year at the time of the FERC's revision of its rules in Order 464 (Docket No. RM85-6). Senator Baucus' remarks on the bill during the November 24 hearing indicated a concern with the fairness of applying the new rule to these pending cases. To aid Senator Baucus and the other committee members in their review of this bill, PG&E would like to make two points: 1) action on many of these projects has already been substantially delayed; and 2) those delays are, in large part, the result of state expansion of the scope of the Section 401 review.

In answer to a question posed at the November 24 hearing, Mr. Fred Springer, Acting Director of Hydropower Licensing at the FERC, testified that the average length of time that the certification requests had been pending is 36 months for the projects affected by S. 1792. Five PG&E applications are included in the list of pending projects subject to the new rule. (A sixth PG&E project is listed, but the application is that of a competitor which has now withdrawn.) The application for relicensing of the Haas-Kings River Project (FERC 1988) has been pending for 52 months, with a request for water quality certification having been filed on August 2, 1983. For the Rock Creek-Cresta Project (FERC 1962) relicensing, the most recent filing was a 1985 amendment accompanied by a request for water quality certification made on March 1, 1985. A third PG&E application for an amendment to add capacity to an existing plant is also on the list of pending projects that would be delayed by S. 1792. A request for certification of water quality conformance was made for Project 803 on July 10, 1985. Two more recent applications were filed for Project 1354 on October 11, 1985, and Project 1333 on November 14, 1985. For all five of these applications, the full consultation procedure of the FERC's regulations was used in advance of filing. Not only has the California State Water Quality Control Board had over a year since the request for certification was made, but it had as much as two years before that to request studies and review data.

PG&E believes the reason that California has yet to act on these requests for certification is not because there are significant gaps in their information on major water quality issues. Rather, it is because California construes its mandate to be much broader than determining, as stated in Section 401, whether the project conforms to state water quality standards. The State Board's apparent view is that it must do a complete, independent review of all environmental issues related to the project before it can issue the water quality certificate.

PG&E certainly does not question the state's desire to thoroughly review the project, but it does question why the certification of water quality conformance should be held hostage to that process. The role of the states in the process of federal hydroelectric licensing has been defined in numerous court cases, regulations, and, most recently, in the Electric Consumers Protection Act. It is clear that the states have an important role in advising the FERC on environmental issues and recommending fish and wildlife conditions. They also have an important role in evaluating quality standards. But those are separate obligations. Congress clearly intended that the FERC, as governed by the Federal Power Act, would have the final word on fish and wildlife mitigation. If the Section 401 certificate is broadened to mean complete review of all environmental issues, then federal authority is completely supplanted, and the federal mandate for comprehensive planning in the public interest is meaningless.

PG&E does not believe that an extension of time for state agencies to act on these pending project applications is needed to address the limited scope of inquiry mandated by Section 401. But beyond that, we believe it is important that Congress not allow states to further undermine necessary federal authority.

Action taken on S. 1792 should not be construed as a signal that Congress approves of the approach some states have taken in trying to stretch Section 401 into a mandate to regulate non-water quality conditions.

For the foregoing reasons, we do not support passage of Section 104 of Senate Bill 1792.

TESTIMONY

SUBMITTED BY

MILITARY ISSUES TASK FORCE

THE RURAL COALITION

ON

S.1584

TO THE

SUBCOMMITTEE ON HAZARDOUS WASTES AND TOXIC SUBSTANCES

COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS

UNITED STATES SENATE

2001 S Street, NW, Suite 500, Washington, DC 20009/(202) 483-1500

Mr. Chairman and members of the Committee:

I am Marla Painter, Director of the Military Issues Task Force of the Rural Coalition.

The Rural Coalition is a national alliance of over 140 organizations dedicated to the development and implementation of public policies which will benefit rural Americans, especially those who are poor or otherwise disadvantaged. The Military Issues Task Force is working to increase rural Americans voice in the Pentagon's decisions that affect their lives daily.

On behalf of small citizen groups and individuals from many regions of this country, we wish to offer testimony to support this legislation, S.1584. For three years we have been working closely to assist rural citizens in their struggle to maintain their physical and mental health, their homes and in many cases, their economic base in the face of habitual and abusive treatment by military training in the airspace over their homes.

The struggle begins with the lack of acknowledgement by most public officials that there is a problem. Secondly, unless one has experienced the low level or supersonic military aircraft training in close range to people or animals, it is impossible to adequately describe the threats such training poses. Third, there is a lack of scientific data examining the clinical, long range physiological impact of this particular stress to people and animals. What data exists has not been organized in a coherent manner that presents a solid case to support what people know is happening to their health. Last, there has been no way for citizens to participate in making decisions about where the military can or cannot train. It has been as though the Department of Defense is excluded from the law and that airspace has no relationship to the land below it. Further, there has been an inherent attitude of the Federal Aviation Administration and the Department of Defense that because rural people populate the land sparsely, they do not count and are expendable citizens; invisible citizens. It is this arrogance on the part of the FAA bureaucracy, the military establishment and finally, the pilots themselves, which has enraged and mobilized rural citizens of all political perspectives.

In order to present you with an accurate picture of the situation, we would need to take you to the rural places affected by military air activity. Because we cannot do that, imagine tending your livestock or fishing offshore and having a jet fighter very suddenly 100 feet over your heat at 500 mph, preceding the unimaginable sound it leaves behind. Your entire body goes into an immediate, involuntary state of panic, terror which leaves you shaken, exhausted and feeling invaded. Imagine being on horseback and having to deal with your terrified animal, as well. Imagine seeing the flow of the engine, feeling the heat and remembering a glimpse of a smiling pilot. Although this sounds unlikely, an exaggeration of an occasional incident, it is in fact a daily occurrence in the rural parts of our country. The most quiet, most peaceful parts of our country. There are low level routes over interstate highways, rural towns, sacred Indian sites, farmhomes, rivers, schools. Further, we have repeated reports that pilots fly off-route by eight to ten miles regularly. People who live near a known low level training route can expect that they will be buzzed unpredictably, but they never know when or where. Their complaints to airbases are met with questions about what model the aircraft was, which service, which squadron, what the number on the wingtip was, how low, at what speed it flew. These questions are impossible to answer unless one is trained to observe such things. Most people simply feel violated and hopeless about preventing it from happening again.

Now, imagine having your home, the ground and hills around you blasted with a force, a crackle, a strange sensation of overpressure which can come only from a sonic boom. You never know when it will hit. It breaks things in your house, cracks the foundation, endangers mining shafts, wells. Mostly, it is another terrifying physiological shock which can affect a person's nervous system and sense of well being. And it is impossible to accurately describe the discomfort it causes.

There are other consequences or unregulated military airspace use which we, as civilians, know less about but which are frightening. Electromagnetic radiation emitted by the aircraft and scoring stations is one threat. The information on EMR that has been publicly released is seriously health threatening and we are beginning to generate more inquiry on these health effects. Another unknown but suspicious hazard is the laser technology used for guidance. There have been some ghoulish, odd and unexplained occurrences which some people feel might be attributable to laser technology. People are branded crazy when they insist on getting explanations about unexplainable animal burns, occurrences of air in rural places becoming highly electrified, as though they are in an electromagnetic field. These descriptions sound loony but scientists who work for the defense contractors tell us (off the record) the ways in which these occurrences can be rationally, scientifically explained. Each explanation is linked to experimentally or currently used weapons technology. But it is not public knowledge. Hence, the military agency denies it occurs and respectable citizens are made to feel like people who are crazy. We aren't suggesting defense secrets be made public knowledge. We are suggesting that they should not be used on civilian populations or landscapes.

I present this small slice or a scenario that is increasingly unfolding for us at the Rural Coalition. We are disturbed because what is happening negates the very purpose of our military service. When we begin to utilize our military ability against our own citizens -- even in the name of training -- we are stomping on the ideals which set us apart from other governments. The citizens with whom we work are not opposed to appropriate use of airspace and land to assure our national defense. They are saying it must be done in a way which is consistent with the ideals embodied by our form of government.

Frankly, most of the citizen groups involved in the airspace issue would like to see large tracts or low level routes be withdrawn for military use only by Congress. In this way, they would have a representative voice in the decision. In lieu of such an "Engle Act of the air", we have assessed unqualified support for Senator Reid's S.1584. Its strength lies in the opportunity it provides people for participating in deciding where military use of airspace should occur. It requires looking at the consequences of using specific areas and it acknowledges that when airspace is used, that its use intimately affects the land and life below.

II

100TH CONGRESS
1ST SESSION

S. 1584

To assure compliance with the National Environmental Policy Act of 1969, and for other purposes.

IN THE SENATE OF THE UNITED STATES

AUGUST 3 (legislative day, JUNE 23), 1987

Mr. REID introduced the following bill; which was read twice and referred to the Committee on Environment and Public Works

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A BILL

To assure compliance with the National Environmental Policy Act of 1969, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. As used in this Act, the term—

(1) "expansion of a special use airspace" means any change in the physical dimensions of a special use airspace previously designated, any change in the activities for which a special use airspace was designated, or any change in airspeed or type of aircraft permitted within a special use airspace previously designated; and

(2) "designated" or "designation" means allocated, awarded, set aside, granted, or otherwise made available, and such term includes the expansion of a special use airspace.

SEC. 2. (a) In the administration of the provisions of section 102 of the National Environmental Policy Act of 1969, and the laws and regulations of the United States relating to the designation of special use airspace (including but not limited to, prohibited areas, restricted areas, military operation areas, alert areas, controlled firing areas, and military training routes (including, but not limited to, routes for military training, research, development, testing, and evaluation)), the designation of a special use airspace shall be deemed to be a major Federal action significantly affecting the quality of the human environment requiring a detailed statement in accordance with section 102(2)(C) of the National Environmental Policy Act of 1969.

(b) For purposes of complying with section 102(2)(C) of the National Environmental Policy Act of 1969 in connection with the designation of a special use airspace, the Department of Transportation, acting through the Federal Aviation Administration, shall be considered to be the lead agency for the purpose of compliance with such section.

(c) Notwithstanding the provisions of section 553(a)(1) of title 5, United States Code, relating to a military function, the provisions of section 553 shall be applicable to any action involving the designation of a special use airspace. No application or request for the designation of a special use airspace shall be approved except after compliance with section 102(2)(C) of the National Environmental Policy Act of 1969 and the provisions of section 553 of title 5, United States Code, as provided by this section.

SEC. 3. The Department of Transportation, acting through the Federal Aviation Administration, shall, from time to time, but not less than semiannually, review each special use airspace which has been designated. If, in the course of any such review, the Department determines that the use of such airspace cannot justify the continued designation of such special use airspace, such designation shall be terminated or modified by the Secretary of Transportation.

II

100TH CONGRESS
1ST SESSION

S. 1792

To authorize appropriations for the Office of Environmental Quality for fiscal years 1987, 1988, and 1989.

IN THE SENATE OF THE UNITED STATES

OCTOBER 16, 1987

Mr. BAUCUS (for himself and Mr. DURENBERGER) introduced the following bill; which was read twice and referred to the Committee on Environment and Public Works

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A BILL

To authorize appropriations for the Office of Environmental Quality for fiscal years 1987, 1988, and 1989.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

TITLE I

SEC. 101. Section 204 of the National Environmental Policy Act of 1969, as amended, is further amended by—

(1) striking the "and" at the end of paragraph (7);

(2) striking the "." at the end of paragraph (8) and insert in lieu thereof "; and"; and

(3) adding the following new subsection:

★(Star Print)

"(9) to promulgate regulations implementing the National Environmental Policy Act for all Federal agencies, including independent regulatory commissions.".

REVIEW FUNCTIONS OF COUNCIL

SEC. 102. (a) AMENDMENTS.—Section 204 of the National Environmental Policy Act of 1969 (42 U.S.C. 4344) is amended—

(1) by inserting "(a)" before "It"; and

(2) by adding at the end thereof the following:

"(b)(1) In addition to any other review and appraisal carried out under subsection (a)(3), the Council shall evaluate, and annually report in writing to the Congress on the results of, the reviews carried out by Federal agencies under paragraph (2) and may include in the report such recommendations for legislation as the Council considers appropriate regarding issues raised incident to the evaluation.

"(2) Each Federal agency shall, on a continuing basis and subject to such guidelines as the Council shall establish, select and review a statistically significant random sample of the detailed statements prepared under section 102(2)(C) by the agency in which measures were specified for the mitigation of the adverse impact on natural resources including fish and wildlife populations and habitat that was predicted to result from the action.

"Each Federal agency shall promptly submit to the Council the reviews prepared by the agency under this paragraph.

"(3) The guidelines established by the Council under paragraph (2) shall require that the Federal agency review—

"(A) the extent to which the mitigation measures specified in the statement were implemented in connection with the project;

"(B) the accuracy of the predicted adverse impact which the establishment or operation of the project would have on fish and wildlife populations and habitat; and

"(C) the effectiveness of the implemented mitigation measures.".

(b) INITIAL REVIEWS.—In carrying out subsection (b) of section 204 of the National Environmental Policy Act of 1969 (as added by subsection (a)), each Federal agency, within twenty-four months after the date of the enactment of this Act, shall—

(1) select and review under such subsection a statistically significant sample of detailed statements that were prepared for appropriate projects which were completed before such date of enactment; and

(2) submit the reviews to the Council on Environmental Quality.

Sec. 103. Section 205 of the Environmental Quality Improvement Act of 1970, as amended (42 U.S.C. 4374), be amended by adding the following new subsection:

"(e) $750,000 for each of the fiscal years ending on September 30, 1987, 1988, and 1989.".

Sec. 104. For each hydroelectric project for which a request for certification had been made pursuant to section 401 of the Clean Water Act but for which no license had been issued prior to February 11, 1987, by the Federal Energy Regulatory Commission, and for which—

(1) more than one year had elapsed since the State certifying agency had received a certification request and the State had neither certified nor specifically denied certification or,

(2) the State agency had either issued water quality certification or denied certification, but the issuance or denial occurred more than one year after State receipt of the request;

notwithstanding any other provision of law, a State or interstate water pollution control agency shall have one year from the date of enactment of this Act to satisfy the certification requirement provided for in section 401 of the Clean Water Act (33 U.S.C. 1341(a)(1)).

COMPLIANCE WITH THE NATIONAL ENVIRONMENTAL POLICY ACT OF 1969

THURSDAY, JANUARY 14, 1988

U.S. SENATE,
COMMITTEE ON ENVIRONMENT AND
PUBLIC WORKS, SUBCOMMITTEE ON HAZARDOUS
WASTES AND TOXIC SUBSTANCES,
Sparks, NV.

The subcommittee met at 2:07 p.m., at City Hall, 431 Prather Way, Sparks, NV, Hon. Harry Reid (acting chairman of the subcommittee) presiding.

Present: Senator Reid.

OPENING STATEMENT OF HON. HARRY REID, U.S. SENATOR FROM THE STATE OF NEVADA

Senator REID. The U.S. Senate Committee on Environment and Public Works, Subcommittee on Hazardous Waste and Toxic Substances will come to order.

I would initially like to express my appreciation to the Webelos Den of Cub Scout Pack No. 585 for leading us in the presentation of the colors and the pledge of allegiance.

The United States Senate committee that I just mentioned is holding this hearing. This hearing will be on the issue of the unchecked expansion of military use airspace. Put simply, military special use airspace is airspace controlled by the military for various training purposes. I recognize the military's need for some airspace, but I've come to question the propriety of the extent to which it has sought to control our airways. More importantly, I object to the process by which the military extends its control over our airspace without adequate regard for the environment or the people and the wildlife living below.

Too often the military has taken advantage of loopholes in the law to extend its control over the Nation's airspace without providing interested people, be they State, local government officials, members of the aviation community, environmentalists, ecologists, ranchers, American Indians, or other affected citizens, with any meaningful opportunity to participate in the airspace withdrawal process.

We in Nevada are all too familiar with the issue of special use airspace. As the charts behind me indicate, 40 percent of our airspace is currently controlled in some way by the military. We're continually asked to give, but when we have attempted to express our concerns, our words have fallen upon deaf ears.

I'm sure many of you here recall the recent withdrawal just north of here at the Hart military operations area or MOA. For your information, an MOA is one of the five categories of military use airspace. When this withdrawal was proposed, my sons Rory and Leif were witnesses at the so-called informal hearings on the withdrawal. While permitted to speak, they were told that what they had to say would have no impact whatsoever on the process. Indeed, what the military requested received the rubber-stamp approval of the FAA as satisfying the National Environmental Policy Act or NEPA.

The military with, in effect, a wave of its hand had increased its control over Nevada's airspace. As illustrated on the charts behind me, the problem of increased expansion of military airspace without meaningful review is not restricted to Nevada nor even to the West. In the last 10 years military special use airspace has increased by over 34 percent in terms of square mileage. The military now controls more than one million square miles of United States airspace.

Significantly, this rapid expansion of military airspace has coincided with an astounding increase in commercial and general aviation flights. These competing concerns appear to be on a collision course and may well be a contributing factor to the alarming increase in aircraft near misses.

I have attempted to address these problems legislatively through the introduction of S. 1584, the Airspace Protection Act. This bill would require the military to live up to its obligations under NEPA by requiring environmental impact statements when the military attempts to increase its control over the Nation's airspace. In this way, the public would be afforded the opportunity to participate in the process.

In addition, my bill would transfer the NEPA lead agency obligations from the military branches to the Federal Aviation Agency. This may help the problems caused by a lack of coordination among the various military branches.

Finally, S. 1584 would require the FAA to review on a semiannual basis the special use airspace designations and determine if the military is sufficiently utilizing its designated areas. Currently there is no procedure for returning unused special use airspace.

Before we begin, I'd like to welcome Lieutenant Governor Bob Miller; Mayor Jim Spoo; Mayor Pete Sferrazza, who is scheduled to be here, and others.

I appreciate your interest in this subject and the courtesy you've extended to me by each appearing here to participate in this hearing. I remind everyone that this is a United States Senate hearing and subject to the rules of the Committee on Environment and Public Works.

Because of the number of witnesses who wish to speak, oral testimony will be limited to three minutes. We must strictly adhere to this time limit. When two minutes have passed, a member of my staff will display a red card as an indication to the speaker that his or her time is about to expire.

Once again, I thank you for being here and look forward to your comments. This is the second hearing we have had on this subject. We recently had a hearing in Washington.

Before we begin the official part of this hearing, I'd like to introduce members of my staff: Bryan Kennedy, a legislative assistant from my Washington staff, is seated to my left. Behind me is Mark Reiter, a professional staff member of the Committee on Environment and Public Works. Also with us is Valerie Weiner, my press secretary; Blaine Rose, who runs my Reno office; Anita Sullivan, a regional representative in the Reno office; Roberta Grinzel, regional representative in the Reno office; and June Schmidt, regional office manager for Reno.

We are now ready to proceed with our first witness, and I'd like to hear from Lieutenant Governor Bob Miller.

I would mention initially that Governor Miller and Mayor Spoo will give testimony but may not be able to stay for the entire hearing.

Governor Miller?

STATEMENT OF HON. ROBERT MILLER, LIEUTENANT GOVERNOR, STATE OF NEVADA

Mr. **Miller**. Thank you, Senator Reid.

I must begin by noting that I felt bad when you introduced your staff, because I have a statewide office and I only have two employees.

Senator **Reid**. That's better than when I was Lieutenant Governor; I had one and a half.

Mr. **Miller**. Times change.

Imagine, if you will, standing near a runway as a jet takes off. The noise can be ear splitting. You can't even hear the person next to you talking. Now imagine the equivalent of that noise in unsettling, rapid bursts that rattle window panes, exploding several times a day in the air above your house. That's what a sonic boom can do.

I used the example of the jet takeoff to draw a comparison. If you've forgotten what the noise of a sonic boom is like, you may be more familiar with the roar of jet engines during takeoff. Jets take off at 140 decibels. One hundred and forty decibels is considered to be the threshold of pain. Depending upon several variables, sonic booms are about as loud. The point is it hurts to hear a sonic boom.

As Senator Reid told the Congress in August, there are reports of hundreds of sonic booms every day around designated low altitude, supersonic areas. Certainly for those Nevadans living near such daily sonic bombardments, to say nothing of the ordinary but constant noise of jets screaming overhead, the experience can be unwelcome at the least.

For an increasingly large number of our State's residents, these intrusions are becoming more of a frustrating reality. Something must be done to balance the patriotic commitment we feel toward our country and our right as Nevadans to control this State.

I commend Senator Reid for holding this vital hearing. As Nevadans, all of us are committed to doing our fair share in helping preserve the Nation's freedom through military strength. We recognize how valuable our State is to the armed services. We house some of the most advanced military training and testing programs in the world, and we're proud of that. The military is important to Nevada. It's important to our economy.

In that regard, I have met with past commanders at both Fallon Naval Air Station and at Nellis Air Force Base, and I discussed the prospects of such things as joint exercises, explaining that such a concept could, indeed, benefit Nevada in our rural economies. Expansion can and will be good for Nevada, but only if the military cooperates and listens to us.

I hope that the military understands the importance of working with us to insure that expansion is safe and mutually beneficial. We in Nevada are unhappy with encroachments upon our property and our private lives. We feel betrayed when we have no meaningful voice in what is snatched from us or forced upon us.

With that in mind, I am here this afternoon to offer my support for Senator Reid's Airspace Protection Act. This bill will give the average Nevadan—the miner, the rancher, the homemaker—a say in his or her future and protect us from further unplanned encroachments.

Recent huge land withdrawals and designations of restricted airspaces, as Senator Reid has pointed out, have presented pressing problems for Nevadans. The Department of Defense and the Department of Energy control nearly 4 million acres of public land in our State, and the DOD is planning the withdrawal of an additional 270,000 acres.

During the past 5 years Nevadans have seen the creation of two separate military supersonic operations areas: one for the Navy and one for the Air Force. We have witnessed the development of low-level training routes by the Strategic Air Command and a new military operations area of 900 square miles for the Oregon National Guard just north of here. Remember that this is done without the Federal Government giving our input any serious consideration.

Nearly 40 percent of Nevada's airspace is under military use and control. Direct private and commercial aircraft can be altered when more and more military airspace is restricted. Military overflights can affect our ranching and aviation as well as our mining industries. Clearly, unchecked airspace withdrawal is disrupting our way of life.

We in the Nevada legislature in the last session adopted Senate Joint Resolution No. 6. This measure calls upon Congress to investigate the designation and control of military airspace by the Federal Aviation Administration. It further encourages Congress to enact legislation that will give the public a chance to participate in the process used to establish airspace classifications and restrictions.

Taking it a step further, Senator Reid in his bill, Senate Bill 1584, is working to coordinate the fractured and piecemeal way each military branch pursues its plans for airspace restriction. Right now there is no review for the cumulative, overall effect of these plans. The Nevadans most directly affected have no reasonable way of insuring their concerns are considered.

Senator Reid's bill would require that proposed designations of military airspace be subject to the National Environmental Policy Act. With passage of this bill, the cumulative effect of these restrictions will be evaluated, public concerns considered, and environmental issues addressed.

As Lieutenant Governor, I can see the positive aspects of the high-tech military presence in our State, but I know that the citizens of Nevada do not want to forfeit their privileges that come with living in this State: open spaces, uncluttered skies, and in some cases even a productive livelihood.

Join Senator Reid in his fight to give Nevadans a voice in their own future.

Senator REID. Mayor Spoo.

STATEMENT OF HON. J. SPOO, MAYOR, SPARKS, NV

Mayor SPOO. Thank you, Senator Reid.

Before I address the issue before the committee, I would, with your permission, take an opportunity to welcome you to the city of Sparks. I might also add that even though I normally chair meetings in this room, I will promise you I will refrain this afternoon from taking over in any respect.

We are honored to have you here today, particularly on this important issue. I might say that I have been particularly pleased since you have been in the Senate, even for a short while now, that you have been willing to take a very productive lead on a number of very significant issues to Nevada. Of course, I think of the Truckee River water issue. I think of the nuclear waste dump issue. I think of the taxpayers' bill of rights, and I think of this issue before us today.

As a symbol of our welcome to the city of Sparks, I have a key to the city of Sparks to present to you today, and I expect to see it on your key ring, by the way.

Welcome to Sparks.

Senator REID. Thank you very much, Jim. I thought you were going to mention the Sparks interchange. That's my greatest piece of work.

Mayor SPOO. That's behind us. No more credit due for that.

Senator REID. Thank you very much.

Mayor SPOO. Thank you.

We are due to go to bid on that project in the very near term, and we are extremely appreciative of your assistance on that.

We are proud of our military in Nevada, both the facilities as well as the personnel, the military personnel in Nevada. I have visited those facilities and it makes anyone proud to see the presence of the military in such a responsible way in the State of Nevada. We would do nothing to jeopardize the success and the viability of their mission here.

But their very success, I might add, the extent of it has created an issue, in this case the military airspace issue. What is required is a balancing of the needs of all Nevadans along with the military. Most importantly, I think this issue indicates to us, as the Lieutenant Governor has eloquently pointed out, we are at a time of decision in this State on many issues and on this issue as well, and the decision is, will Nevada be a tool of the Federal Government or will we be a partner of the Federal Government.

Senator, I congratulate you once again because I think that your bill very effectively addresses the need for balance on this issue.

I'm happy to be here. Thank you.

Senator REID. Thank you very much, Mayor Spoo. We appreciate your attendance.

Mayor Sferrazza, do you wish to give a statement?

Mayor SFERRAZZA. Just a very brief one.

Senator REID. Mayor Sferrazza? Perfect timing.

STATEMENT OF HON. PETE SFERRAZZA, MAYOR, RENO, NV

Mayor SFERRAZZA. I apologize for being a little late.

As a citizen and as mayor of the city of Reno, I would like to urge, with Mayor Spoo, the support of your proposal. It is essential to our city and to the State that we get fair treatment with regard to the military, and we're very much in support of your position on this issue.

Senator REID. Thank you very much, Mayor.

As I explained to the audience before you arrived, your presence here is important and you're welcome to stay as long as you wish. We know that you have a busy schedule, and whenever you feel that you have to leave, please do so.

Mayor SFERRAZZA. Thank you.

Senator REID. We will now call witnesses in panels. We've found that panels work best.

The first panel we will hear will be from Marla Painter, Bob Fulkerson, and Rose Strickland. Would you please come forward?

There are microphones here at the front of the room. If you would proceed, first with Marla, and then the other witnesses, we would appreciate it.

I would suggest that these hearings are being taken down and will be transcribed into testimony that will be circulated to the rest of this staff and to the committee members. Everything that is testified here today will be made a part of a permanent record.

I would also indicate that for those witnesses who are unable to testify today, the record will be kept open. I'll make an announcement at the end of this hearing so that testimony can still be made part of this record at a later time.

Marla, you may proceed with your three minutes.

STATEMENT OF MARLA PAINTER, DIRECTOR, MILITARY ISSUES TASK FORCE, RURAL COALITION

Ms. PAINTER. That's going to be hard, but I'm going to attempt it.

I'm Marla Painter, director for the Military Issues Task Force of the Rural Coalition.

The Rural Coalition is an alliance of over 140 organizations that are dedicated to the development and implementation of public policies which benefit rural Americans, particularly those who are poor or otherwise disadvantaged.

The Military Issues Task Force works to increase rural America's voice in the Pentagon's decisions that affect their lives. Most of the training and military activity that does occur within our borders does happen in rural areas, and rural people are oftentimes badly affected by that. At the same time, most of those rural people who receive that treatment are some of the most patriotic of our citizens.

On behalf of small citizens' groups and individuals from many regions of the country, not just Nevada, we wish to offer testimony to support efforts to relieve ongoing abuse by our own military against rural people, and specifically we want to support Senator Reid's introduction of Senate bill 1584.

For over 3 years now we've been working closely to assist rural citizens in their struggle to maintain their physical and mental health, their homes, and in many cases their economic base in the face of habitual and abusive treatment by military training in the airspace over their homes. I'm here today representing groups from rural people and groups from Minnesota, Washington State, Indian people from North and South Dakota, Arizona, people from areas that have no organized opposition or do no organized work with military but which feel that they are being abused in ways that most urban people don't have to put up with.

The struggle begins with lack of acknowledgment by most public officials—indeed, the general public—that there is a problem. Unless somebody has ever been affected by a low-level fighter jet or a B-1 bomber, it's very, very difficult to describe what that impact is and how terrifying it is.

Secondly, it's impossible to describe the threat overall that such training poses to people and their lifestyles, their rural lifestyles. There's also a lack of scientific data that examines the clinical, long-range physiological impact of this particular stress to people and animals. What data does exist has not been organized in a coherent manner that presents a solid case to people so that they'll know what's happening to their health.

Thus, there's been no way for citizens to participate in making decisions about where the military can or cannot train. There is a kind of inherent assumption in our culture that the military is a sacred area of our Government.

Is that my signal? One more sentence.

It's been as though the Department of Defense is excluded from the law and the airspace has no relationship to the land below it, and there has been an inherent attitude on the part of the FAA that they have no responsibility to the people on the ground below the airspace that they regulate.

It's for these reasons that we commend Senator Reid and we hope that he can convince other Members of the Senate to pay more attention to what we consider an outrageous abuse of American citizens.

Senator REID. I want to thank you very much. Your entire statement will be made a part of the record.

Mr. Fulkerson?

STATEMENT OF ROBERT FULKERSON, DIRECTOR, CITIZEN ALERT

Mr. FULKERSON. Thank you, Senator, and greetings to all of you. My name is Bob Fulkerson. I'm the director of Citizen Alert. Citizen Alert is a statewide organization that was founded in 1975 to insure public participation in decisions that affect the land and the life in Nevada. Like most Federal issues that affect Nevada, Nevadans have had little opportunity to participate in military airspace decisions.

A prime example of this is the Hart MOA when in 1985 the 114th Tactical Training Fighter Squad of the Oregon Air National Guard decided to take over a 900-square-mile area of northern Washoe County for use as the military operations area. In spite of nearly unanimous opposition on the part of local people, private pilots, and concerns of State agencies and environmental advocacy groups, that the MOA could have an undeterminable impact on a number of Nevada natural heritage sites, wilderness study areas, and the Sheldon antelope range, the Air Force was exempt from following the provisions of the National Environmental Policy Act. The Federal Aviation Administration had no desire to meddle in environmental impacts, either, or citizen concerns and was happy to oblige the Air Force request.

This scenario has been repeated time and again to the extent that over 50 percent of the airspace over the 48 contiguous States is now special-use airspace.

We feel that S. 1584 would put the onus on the FAA to force the military agency proposing the withdrawal to comply with NEPA. This would greatly alter the FAA's autocratic methods.

The legislation would especially be useful to Nevadans because we're already home to an alarming array of air combat war games and because we are continually being bombarded with demands for more military airspace activities. For example, a round trip VFR flight in 23 Charlie between Fallon and the Lincoln County Airport, which is about 220 nautical miles southeast, will take a T-210 about three hours. Depending upon the course and altitude flown, you'll pass through, along, or into two to four MOA's, two to three SOA's, 30 military training routes, two Strategic Air Command low-level bombing routes, two restricted areas, and a cruise missile test route which is now being proposed for expansion.

The low-flying jets and sonic bombs have already destroyed Dixie Valley. Land, animals, and people, Indian nations, and the States and provinces across the U.S. are threatened with the same kind of abuse on a massive scale. While we understand the individual pilot's need to be well trained, we question the need for the massive spending on armaments which is triggering the requests for additional supersonic, low-level, and other military airspace activities.

So, in addition to bills like S. 1584 and in addition to promoting better communication among the military agencies and coordination, we feel that cuts in the military budget would also reduce the amount of hazardous air combat training in our skies. We support S. 1584 because it would expedite citizen participation in military airspace decisions and reduce the amount of piecemeal withdrawals. It would also give Nevadans a voice in steering the State away from the hitherto tight-fisted control of the Pentagon and help return the solitude of our high desert mountains and wide open valleys.

Thank you.

Senator Reid. Ms. Strickland?

STATEMENT OF ROSE STRICKLAND, CHAIR, TOYIYABE CHAPTER, SIERRA CLUB

Ms. **Strickland**. Thank you.

I'm Rose Strickland. I represent 2,500 members in Nevada and eastern California.

Thank you for providing us with the opportunity to testify on Senate bill 1584 today in Sparks. The Sierra Club wholeheartedly supports this legislation which is designed to correct longstanding and extensive problems. These problems are multifold.

First, the public is not given an effective opportunity to raise concerns about proposed withdrawals of airspace from military use either by the military or by the FAA. The FAA apparently holds itself exempt from the public participation requirements of NEPA, and the military decides if it does or does not have to comply.

Second, when the level of public controversy does force a public hearing such as occurred last year over the proposal by the Oregon National Guard to acquire hundreds of square miles for a military operations area in northern Nevada that Bob referred to, public concerns were totally ignored by both the military and the FAA. These concerns were raised by residents; visitors; local, State, and Federal officials; local, State, and Federal government agencies, and aviators.

The FAA appears to routinely rubberstamp these proposed military air withdrawals with no consideration, or no serious consideration, given to public concerns.

Third, the impacts of military operations, including low-flying aircraft and sonic booms, on the health and welfare of human residents and visitors and wildlife has never been examined or apparently been considered in the permitting process by the FAA or by the military.

We could spend far more than the three minutes allotted for our testimony today detailing the close encounters of the dangerous kind between our members and low-flying military aircraft and sonic booms while recreating on the public lands in Nevada.

Fourth, the military apparently does not have to justify its extensive airspace withdrawals either at the time it first applies or subsequently. The public has no way to know or determine if a particular military air withdrawal is actually needed initially or whether continued withdrawal is justified.

For all of those problems, S. 1584 proposes specific solutions. We totally support the requirement that the FAA designation of special use airspace is specifically brought under the scope of NEPA, requiring the FAA to be responsible for the development of an environmental assessment or environmental impact statement. We also support the periodic review of special use airspace to determine if its benefits continue to outweigh its costs.

The Sierra Club would suggest, in addition to the proposed legislation, to specifically require the FAA to reveal the criteria it uses in its initial decision on a military airspace withdrawal proposal, as well as in subsequent periodic reviews in a full and open public participation process.

In conclusion, the Sierra Club believes that S. 1584 is needed because of the extensiveness of military air withdrawals and the lack of an effective process for public participation in these decisions affecting public airspace as well as for the examination of the potential environmental impact of the withdrawal.

Thank you for considering my comments.

Senator REID. Before the panel leaves, Mr. Fulkerson, for the record, would you explain what Citizens Alert is, the organization?

Mr. FULKERSON. Certainly. We're a statewide organization. We have 1,100 members, a volunteer board of directors who come from throughout the State, a 501(c)(3) nonprofit organization. I am the full-time director. We have three other part-time staff, one of whom, Bill Vincent, lives and works out of our Las Vegas office.

Senator REID. Are there other Citizens Alert organizations in the rest of the country or is this unique to Nevada?

Mr. FULKERSON. This is unique to Nevada. We were started by Susan Orr and Katherine Hale, two local women, in 1975 when the Federal Government proposed a retrievable, surface storage facility, which is another euphemism for a waste dump, in southern Nevada.

Senator REID. Thank you, Mr. Fulkerson.

We know about the Sierra Club. I'm wondering if, for the record, you could please, Ms. Painter, explain to us what the Rural Coalition is and how it originated.

Ms. PAINTER. The Rural Coalition originated in the late seventies as an organization that would help the rural citizens of this country. There are a number of small citizens' groups, and in our organization over 140 who are working to try to promote policies that will assist rural Americans in their struggle to be able to remain in rural America, make a decent living, and live above poverty levels.

At this time, we have task forces that are made up of rural citizens that direct our work. We are located in Washington, D.C. We have five field staff in different parts of the country, and all of our work is directed by our membership. It is in the areas of agriculture, natural resource use, jobs, Native American or American Indian, and military issues as well as community development.

We generally help citizen groups figure out what it is they specifically need to help them get themselves organized to do it and then join together with other citizen groups around the country to have a unified voice to support one another in their needs.

Senator REID. Thank you. I appreciate your time and attention and your efforts in this hearing.

Ms. PAINTER. Thanks. We appreciate yours.

Senator REID. The next panel will consist of Linda Bark, interested citizen; Ed Cowan, interested citizen; David Nadell, interested citizen; and Don Quilic, interested citizen.

While they're taking their seats, I would like to recognize two members of the Sparks city council: Celia Colling—Celia, would you stand, please?—and next to you, another member of the Sparks city council, Shirley Weedow.

The first witness will be Linda Bark. Would you proceed?

STATEMENT OF LINDA BARK

Ms. BARK. Thank you. My name is Linda Bark. I am a nurse and a psychotherapist and a 25-year resident of Washoe County. I applaud Senator Reid's bill S. 1584, and want to support it from both a personal as well as a professional perspective.

Personally, I have vacationed in the Black Rock Desert, Surprise Valley, Lake City, and the Warner wilderness area. I've become increasingly disgusted with the use and misuse of airspace in our region. As I began to look into this subject, I became appalled at the uncreative and abusive attitude and planning involved in the airspace takeover.

For the military to ignore the environmental impact of noise aircraft is bizarre. They act as if we don't have ears. A body has a stress reaction to shocking noise just as much as it has a reaction to a violent visual stimulus. To act as if a wilderness area stops at the ground and does not include the space above it is absurd and much to the advantage of the military.

A great deal of my professional life involves stress management, working with individuals and companies, and we really need places for people to go where they can relax, rest, and have a decent place for recreation. Recreation refers to the ability to recreate, and we need a place to recreate ourselves, to renew ourselves, and to balance with nature.

I sincerely thank you for your work in this area.

Senator Reid. Thank you very much for your testimony.

Ed Cowan.

STATEMENT OF ED COWAN

Mr. Cowan. My name is Ed Cowan. I support the Reid Airspace Protection Act, but instead of telling you why, I'm going to talk about how to resolve the whole military airspace problem.

First, let me say that I'm a writer-thinker on the arms race. I've got a number of ideas on disarmament. To summarize down to a nutshell, if we can achieve worldwide arms reduction, not just with the Soviets, but all nations, we can save $32 trillion worldwide through the year 2000. We Americans can save $7.8 trillion.

The way to move toward this cornucopia of money and at the same time resolve the airspace problem is with a two-year, 10 percent total defense reduction by the superpowers. I call it TDR—Total Defense Reduction. Both the U.S. and USSR would cut their defense expenditures, with onsite inspection to insure compliance, by 10 percent for two years.

With this single agreement, which we could have ready to sign by the next summit, we would bag three birds: No. 1, a savings of 67 billion of the 70 billion needed to meet the two-year Gramm-Rudman requirement. This is the news that stock and money markets are waiting to hear. It will stabilize the world economy and prevent a recession or worse.

As you know, last Friday the Dow took a dive, its third highest. A TDR will forestall a final and fatal dive by the Dow.

No. 2, TDR will retire a lot of Soviet soldiers, maybe more than a million men who will be returned to civilian life, their weapons salvaged and melted. Why? Because the cuts will come in the superiority of each nation—where else? They have 5.1 million men in uniform to our 2.1 million. So I say goodbye to a million of their grunts and airmen. This is agreeable to them because we Americans are making comparable cuts in our superiority, research and development and weapons procurement.

Most relevant to our discussion here, a TDR agreement, along with the INF and START agreements, will turn around the arms race. If the U.S. and USSR can kick the heavy metal habit for 2 years, the arms race will have become the disarms march, and the Navy, Marines, Air Force, and Army will need less of their ground and airspace as their forces are reduced in the years ahead.

So with TDR we get three birds with one shot, and one of the birds is the reduction of military airspace in Nevada.

Thank you.

Senator REID. Mr. Nadell.

STATEMENT OF DAVID NADELL

Mr. NADELL. Gentlemen, the basic premise of the RAPA is sound insofar as it goes. However, the restrictive perspective, if becoming law, only addresses a portion of the overall airspace problem.

The givens: one, the military must have airspace in which to improve and maintain combat efficiency. Two, the commercial aircraft are contained within certain corridors during the majority of flights and are monitored by ground stations. Three, military aircraft performance criteria exceeds that of commercial aircraft, especially in altitudes above 50,000 feet. Four, private and business aircraft are not subjected in most cases to the same safety restrictions as commercial aircraft and are an ever-present danger to both commercial and military aircraft.

In view of items 1 through 4 above, it appears that S. 1584 has not taken over our position in either the segmentation of the available airspace, nor does it encompass the thousands of daily flights of private/business aircraft whose only requirement is to file a flight plan and in days of clear weather to literally have full discretion in their air activities. Of course, those aircraft must observe restricted airspace but within their area can move around at will.

It is assumed that RAPA will apply in every State and that the FAA will exercise its authority in a forceful manner. Yet, the justified criticisms levered at the FAA give pause to the anticipation that it will, in fact, carry out its mandate on a continuing, current basis.

The "citizen involvement" is not clearly stated and should be a specific part of S. 1584. Otherwise, the vested interests will control the implementation of the proposed act and the public at large will only have a minimum of effect.

It is, therefore, recommended that modifications be made to the act that will result in a more realistic approach to the basic problem that will be more directly inclusive of the above comments.

Thank you.

Senator REID. Thank you.

Mr. Quilici.

STATEMENT OF DONALD QUILICI, INTERESTED CITIZEN, REPRESENTING THE ORNSBY SPORTSMEN'S ASSOCIATION, CARSON CITY, NV

Mr. QUILICI. Senator, for the record, my name is Donald Quilici, and I represent the Ornsby Sportsmen's Association, OSA, of Carson City, the largest sportsmen's organization in Carson City and one of the largest sportsmen's groups in the State of Nevada.

OSA respectfully requests to be recorded as supporting Senate bill 1584. As sportsmen, we're concerned with an ever-increasing impact by the U.S. military not only on our State, but also on the wildlife of Nevada. Nevada, by its very nature and the nature of its climate and geography, is not blessed with conditions to be known as a game-rich State, and any impact on our very limited wildlife resources can be significant and far-reaching in scope.

Any withdrawal of Nevada airspace which restricts civilian flights is obviously going to impact the Nevada Department of Wildlife's aerial surveys which are extremely critical to the management of our big game species. We would like the record to show that OSA is not opposed to the withdrawal of Nevada's airspace for military purposes provided that there is an orderly process for public input to that process.

We would also request that the U.S. military be required to comply with the National Environmental Policy Act of 1969 and that, additionally, the U.S. Department of Transportation be designated as the lead agency to insure compliance with that act.

We feel that the citizens of Nevada should be afforded a fair and timely opportunity to provide public input into a process of withdrawing any of Nevada's land, air, or water from its citizens by the United States Government.

Recognizing that some 87 percent of Nevada is in Federal ownership, we're left with an impression that our State is comparable to a stick of salami and we may not notice each time that a tiny slice is cut from that stick, but ultimately the stick is gone and there's nothing left.

We urge your committee to approve Senate bill 1584 and to provide the people of Nevada an opportunity for public input before Nevada, too, is all gone.

Thank you.

Senator REID. Before this panel leaves, Ms. Bark, you described to us your profession, Mr. Cowan, would you mind explaining to us your background for purposes of this record?

Mr. COWAN. I'm a simple freelance writer. I have been on the issue of the arms race—as I call it, the nuclear-tipped arms race—for about 6 years now. I haven't had much success with my ideas—a few newspapers. But I try to look at the whole problem and how to cure it. This is going to go on and on for years. In fact, as long as the arms race grows, the red on that map over there is going to increase. It just has to. As long as we continue to grow—and we have, if you look at our expenditure for defense—as long as we continue that trend, it seems to me it's inevitable. If we turn the arms race around with a 2-year, 10 percent reduction, we'll prevent an economic collapse, which is what I'm primarily concerned with, and also eliminate the need for ever-more airspace and actually reduce it.

Senator REID. Thank you.

Dr. Nadell?

Mr. NADELL. Yes. I'm a management consultant. My background includes infantry, World War II and Korea, as a flying officer and an electronics officer. I'm also very much concerned with the inadequacy, in particular, of the FAA in its various pursuits and feel that there are some things that can be done to modify this act so that it does encompass some of the criticisms that were aimed at the FAA, and also as to what action the DOD would have to take in order to present its case as well as the private citizen, because in this situation it is very difficult for the private citizens to keep aware of what the FAA and what the DOD is doing unless there is some commission or some group of some sort that could be organized to have its impact without divested interests that will their own lobbying, I'm sure.

Senator REID. What is your profession or occupation?

Mr. NADELL. International management consultant.

Senator REID. I missed that; I'm sorry.

Mr. QUILICI. The reason I ask this, it really helps when we read the record.

My background is I served as a data processing manager for the Nevada State Department of Transportation.

Senator REID. Thank you very much, each of you, for being here and giving us the benefit of your testimony. All testimony was excellent. Mr. Quilici, yours was very unique, and I'm going to look at that more closely. That's good material for a speech of mine.

The fourth panel will be Charlie Watson, Nevada Outdoor Recreation Association; Mr. Ed Robbins, who is with Citizens Alert; and Dr. Richard Bargain. Would the three of you come forward, please?

Mr. Watson, would you please proceed with your testimony?

STATEMENT OF CHARLES WATSON, DIRECTOR, NEVADA OUTDOOR RECREATION ASSOCIATION

Mr. WATSON. Thank you, Mr. Chairman.

Dear Mr. Chairman and Senator Reid, I'm director of the Nevada Outdoor Recreation Association, Carson City, a national organization that has 450 members in 17 States.

This organization has long urged an angle act of the air and welcomes the proposed enactment of the Airspace Protection Act. We are and have been coplaintiffs in two suits, one still ongoing in the Sacramento U.S. court versus the phenomenon we've come to call the "Afghanistanization of America."

We must corral the military industrial complex into adherence to our environment protection laws. It's a much bigger problem than simply airspace abuse. We have unprecedented seizures of both airspace and Federal lands that pose not only a threat to our environment, but a clear and present danger to the people, life, limb, property, and basic constitutional liberties.

We can cite notorious incidents: the Groom seizure, Dixie Valley, the Sheehan case in southern Nevada, and the reserve SOA where one man was blinded. Public hearings into these issues have become another sham, as the case with the Hart MOA. Experience has taught us there is no accountability; we are losing civilian control of the military.

The military has reduced the FAA to a virtual non-entity when it comes to the FAA's duty to protect us from low-level, high-speed, and supersonic flying. We have seen firsthand the debilitating effects on sensitive lands and crucial habitat. As early as 1968, the Department of Defense has known that combat supersonic flying can create overpressures of 180 pounds per square foot, a level known to be potentially lethal.

Indeed, the Department of Defense has testified in regard to the California desert conservation area recently that, "Wilderness cannot exist" with their escalating onslaught against us and the land.

People on the ground have already died or have been maimed by supersonic flying. It can be shown that nearly 50 percent of America's entire airspace, national airspace, has already been taken, and the DOD wants more.

The DOD must be compelled to live with such laws as the National Environmental Policy Act. You must have meaningful citizen standing—I repeat, standing—with the decisionmaking process. We don't have that now, especially in regard to supersonic operations areas, military operations areas, and massive seizures of Federal lands. We simply have too much DOD law breaking even with existing laws. We simply have too much—they enter wilderness study areas without notifying the Bureau of Land Management. We just found that out in the Revelie Range in eastern Nevada.

There is no sunsetting of blatant contempt for rural America. The public record shows that Nevada is regarded as a sandbox. We have one high-ranking military officer in New Mexico at Holliman Air Force Base who has actually stated, "We're going to take all we can get."

This shows how out of control things really are. Congressmen must not only pass this act, but resume its oversight responsibilities against well-known illegalities, misconduct, and abuse.

Thank you, Mr. Chairman and Senator Reid, for this opportunity to express our views. Thank you.

Senator REID. The next witness will be Mr. Ed Robbins.

STATEMENT OF ED ROBBINS

Mr. ROBBINS. Good afternoon, Senator, and thank you for giving me the opportunity to come before you and testify here.

Before I go any further, I would like to offer myself as an example of what sonic booms can do. I used to be over six feet tall and good looking, so you can see what can happen. [Laughter.]

I'm from Dixie Valley, and, in our estimation, it's gone. This is something that we wrote, and I hope nobody else has to write one like it.

Most of my neighbors are gone now, and soon their homes along with all signs of their toil will be extinguished forever. The wind now blows dust through empty houses that were once filled with people with warm smiles and friendly laughter. This valley shows little signs of war, but there was one. It lasted five long years, day in and day out, year in and year out, and the cost to preserve a way of life, individual freedoms, and a republic came dear to many.

For some who were forced into this war thought they were guaranteed and protected by vested rights and equal justice for all, but found that those rights had been replaced by profound arrogance, inequality, and abrogation of responsibility.

We can only wonder how many more Dixie Valleys there are going to be in the future in rural America. Will those people be treated as second-class citizens to be used as experimental animals, as we?

The Navy had the requisite intent and knew of the substantial certainty that their action would cause a detriment to the people underlying those activities. The United States Navy and their supersonic operations area came to this valley in the summer of 1982 with the full intent to cause the people to abandon their land through continued harassment by buzzing everything that moved: vehicles, animals, tractors, school bus, and passing so close to our homes that we could see the pilots in their planes.

On the summer's night of June 14, 1984, a flight of helicopters belonging to the Navy attacked residents in this valley and their homes. An F-14 crashed not far from a home, starting the desert on fire. The date was June 20th, 1986. Two F-18's bombed the Nevada ghost town of Fairview off the face of the earth not far from here.

We have to drive 14 miles through an electronic warfare range filled with electromagnetic radiation, pass by a laser range and a bombing range at the south end of our valley just to get to town, which is 75 miles away.

When the Navy excercises on another bombing range called BOBA 20, it causes our valley to shake like a lily and collapse our wells. Over 500 sonic booms have rained down upon our heads, blown out windows, moved and cracked walls, driven livestock from the range, killed animals, and shaken the very foundations of our homes.

Cruise missiles have been seen flying through our valley. Now the Air Force with its full complement of weapons wants to use our valley also—B-52's, so big and so low, it seems as though we could almost touch them.

Where will it all end? It seems like the beginning of our Armageddon.

If I may finish this short piece here, then I will——

Senator REID. Proceed as quickly as you can, please, Mr. Robbins.

Mr. ROBBINS. All right. Thank you.

We are all aware that our military needs to train to be the best and with this we do not argue. We want them to be strong and a formidable force for freedom, but not at the expense of our own citizens. This country was founded upon laws to protect the rights and freedoms of the individual. To make a small segment of our society bear the entire burden of the cost of freedom of this Nation is a violation of those laws, and it violates the oath those people in the Navy took which was to uphold and support the Constitution of the United States.

It is not a matter of being unpatriotic or un-American for not wanting to relinquish our land and our freedoms, because the origin of the military was to protect a way of life, not destroy it. We must ask, however, Mr. President and Members of Congress, who gave the Navy the authority to attack these Americans?

I will skip part of this and go to the last part because those are the people in Dixie Valley that want me to read this.

So, be on guard, people, for your valley that seems so secure and remote now may well be next on the agenda of the Department of Defense, for we have been and we have seen, and we now know that a beautiful valley such as ours can be turned into a living hell. There are those who now lie beneath the soil of this, God's beautiful valley, and their spirit will join with those who were driven from their land by arrogance and despotism, for they shall remain and never be forgotten, a part of the Dixie Valley legacy forever.

Thank you.

Senator REID. Mr. Robbins, your complete statement, some of which you were not able to read, will be made part of the record.

Mr. ROBBINS. Fine. Thank you, sir.

Senator REID. Dr. Bargen?

STATEMENT OF RICHARD BARGEN

Dr. BARGEN. Thank you, Senator Reid.

I have one tongue-in-cheek suggestion as far as the airspace problem goes. Apparently, if you juxtapose the entire Department of Defense budget against the rising cost of a single aircraft, from a P-51 onwards, a cost halfway through next century, which means the entire budget will purchase one aircraft which could be shared among the various services, and we'd only need one restricted airspace, which could be circulated across the country.

But, more seriously, people have mentioned many problems, and I agree with all of them. To summarize my concerns, we have created a minority in rural America defined by demographics that's subjected to what I perceive is a public health problem due to airspace activities.

The source of the problem is the perennial, supposedly, clash between society and technology, which is an issue in many fields. We have the perennial clash between the rights and protections of minorities, in this case again a demographically-defined minority, and Government pursuing the common good.

We have a very distinct problem with misallocation and misuse of a national resource, which is the airspace. We have a total disregard for the well-established legal principle of private ownership of airspace to a certain altitude. I've researched this enough to believe that if we could—this airspace bill, what would be even more effective, if you could even put an amendment in it or change it to have people notified when they buy property, and when someone sells property and someone else buys it, that their airspace—the airspace above their property is explained to them. Whether it's military training, or whatever, they have to know about it. The way the country runs, that would be much more effective than the FAA, which I——

Senator REID. Would you restate that? I didn't understand it.

Dr. BARGAIN. I'm not a real estate person, but when you buy property, if someone has an easement over your property, you're told that when you buy the property. It's part of the title or contract that you get, but you could go to where I live and buy a home, a very beautiful place, and you could not know that your yard to the surface of the earth is taken for a military training route until the jets start coming through. It's sort of a buyer should know those things.

If people became aware—the two maps I have here show the actual extent of military use of airspace. In other words,——

Senator REID. The two with the red on them?

Dr. BARGAIN. The red represents military use airspace, including military training routes. The Nevada map is current as of about January, and the one behind it is current as of about April.

They're both rather unique maps in the sense that no one has ever put maps which showed all military use airspace together.

Senator REID. Dr. Bargain, that differs from the one I have, doesn't it?

Dr. BARGAIN. Yes.

Senator REID. Tell me why.

Dr. BARGAIN. I think the primary difference is simply that I've plotted the military training routes. I've used the Defense Mapping Agency—it's called the AP/1B—profiles for each military training route and plotted them out carefully to scale. It represents about 400 hours of hand plotting, but it is, to my mind, an actual representation of what military use airspace—and I should say low altitude, below 18,000 feet——

Senator REID. That certainly shows more than the 40 percent that I have on my map.

Dr. BARGAIN. It's about 70 percent in actuality.

Senator REID. Tell me again why your map differs from mine.

Dr. BARGAIN. What you've shown on the map that's behind you is the restricted areas and military operations areas, which are very important. The military training routes are actually even more important and even less under public scrutiny because, to a certain extent—for instance, a visual route which many of these red lines represent can be created without any input from the FAA. If the FAA opposes the creation of a VR, the military, under FAA regulations, has the ability to create it in any case. There is very little public input. They can be changed literally every 56 days. The change that has happened has really been one of expansion.

They are very detrimental. Most of rural Nevada when you go from Ely to Fallon, let's say, what's not restricted military operations areas is, because of the military training routes, an unofficial, confluent airspace. It is a problem that your bill won't stop, in my opinion, because the military training routes—for instance, the strategic training range complex consists of a number of these routes, but what SAC has said is that we will ingress and egress these routes at random. So you have set routes, but it's a paper—it's sort of a facade because you have an unofficial airspace. You can go in and out at any point. So you have a military operations area, in effect, at very low altitudes, but no one recognizes it. The FAA doesn't say anything.

I have read your bill very carefully, and I don't believe that type of problem is addressed at all. The FAA has been very ineffective in dealing with environmental jumping through the hoops of NEPA.

I'm very pleased to see this bill because your recognition of the airspace problem has been for a number of years very far ahead of its time, in my opinion, but it's really—I think the bill has to be strengthened considerably to solve the problem.

I'm taking a lot of time here. I'll just say that I don't believe the military has airspace that is suited to its needs because this has grown up in a hodge-podge fashion. I think it would benefit everyone, including the military, to completely reevaluate how training is done and what they need and, if we have to create different types of airspace in new areas, let's do it.

I would ask your help also—there's a cruise missile route that was announced coming across Gabbs Airport and up into the Fallon area by the Air Force. I've read the documents. They're very poorly supported, and this expansion of this cruise missile route into our neck of the woods I would strongly oppose at this point. I hope you can do something to at least get more information on it.

Senator REID. Doctor, for the record again, you're a medical doctor?

Dr. BARGAIN. That's right.

Senator REID. What is your interest in airspace? Why did you first get interested?

Dr. BARGAIN. I'm a pilot, civilian pilot, and I was flying about 700 hours a year operating a flying doctor's service in Nevada.

Senator REID. Why did you stop?

Dr. BARGAIN. Well, it's not a long story. I believe that I was accused of flying over a Navy installation in Dixie Valley, within 500 feet of it, and my license was suspended for 60 days. That's still under appeal and I've written you a letter about that, but that would sort of put the dagger in the heart of our flying doctor service.

Senator REID. Using my map or your map, tell me why it probably is difficult flying around rural Nevada on emergency cases. Was it more difficult than other places because of the restricted airspace?

Dr. BARGAIN. It's a difficult problem. I think that the military air arms don't really know how to react. They're protecting their turf. They're just not coordinating things. So if you have an emergency, I found that the various air bases were very cooperative. There's not a problem in that sense. It is a hazard to aviation, but the hazard is both to the military pilot and to the civilian. The only thing is the military pilot usually gets to pull the ring and eject if something happens, and the civilian kind of takes the long way down.

But it is a hazard. We have the supersonics operations area, for instance. The FAA is not going to chart them. They're not found on charts. They're not marked. If you don't know about them, you don't know about them. This is simply a way to get around creating more restricted airspace, but it's a fact of life. It's an extremely hazardous airspace.

Senator REID. Is it higher than most civilian aircraft fly, though?

Dr. BARGAIN. No, I would say that certainly when I was saying I was probably the busiest civilian pilot in Nevada, and most of my flights would be from about 10,000 feet to about 15,000 or 16,000 feet, just to clear the terrain. It's a very mountainous country.

Senator REID. Something that I'd like to mention is how the State of Nevada is losing its rural character. A number of you have mentioned that in passing, but when I first ran for statewide office there were more people in rural Nevada than we have today. With the Reno and Las Vegas metropolitan areas growing so rapidly, the numbers of people in rural Nevada is dropping all the time. That's why I admire Marla Painter so much. I don't know if she's still here, but at least there's somebody fighting for rural America, because the numbers aren't there anymore.

I have a couple of questions I'd like to ask before the panel is excused.

First, I'd like to say something about Charlie Watson, and I hope I don't embarrass him by doing this; I mentioned to my staff that Charlie has prepared, over the years, a great book. I don't know what will ever happen to your book Charlie, but it's one of the most interesting books I've ever looked at, and I've only been able to spend a few hours with it. I have recommended—and I hope you'll agree to this sometime, Charlie—to bring your book to my Reno office so that they can spend some time with you going over that. It's a great education for anyone that wants to know what Nevada's all about. I would have my Carson City office come over at the same time because they're the ones that deal with rural Nevada.

You've done a job that I don't think can ever be duplicated because much of what you have in that book has been destroyed—I shouldn't say "much," but some of what's in that book has been destroyed.

Mr. WATSON. Senator, that book is going to be kept at the Nevada Historic Society over here on the University of Nevada campus. I might say that it was started 30 years ago this September, and it is the oldest BLM public land environmental project in the United States, and it led to the enactment—it was shown to the Public Land Law Review Commission in the mid-1960's and it became the basis for the enactment of the Federal Lands Policy and Management Act.

Senator REID. Dr. Bargain, using your expertise as a physician, I have heard from time to time that airplane noise has no effect whatsoever on animals or people, and then I hear on the other hand it does. Based on your experience as a physician—you don't have to tell me about animals, but if you could tell me, based on your experience, do you think these airplanes flying around civilians has any effect on their physical or emotional well-being?

Dr. BARGAIN. I think the prime problem, the most important result of what's going on now is that most people in rural Nevada actually feel like they're losing control of their lives because of the airspace use above them, and that has sort of, I guess, unstudied psychological types of impacts. That would be the most fundamental thing.

Low overflights above 500 feet aren't too alarming. You can normally hear an aircraft, especially when it's under 500 knots. Sonic booms are, I think, very destructive. Even in Gabbs which is 15 miles outside the SOA, I've had windows blown out of my clinic. I have to be careful if I'm doing minor surgical procedures. I have to remind myself that if a sonic boom strikes, to be cautious, especially, let's say, if I'm taking a foreign body out of an eye, and so on. So it pervades your life in that sense. You don't jump as much as perhaps a new person in town, but there's a whole spectrum of sonic booms, from the ones that people in Reno might be used to, just sort of a double boom, to ones that are literally like an explosion. You can't help but just raise yourself right off the ground.

To summarize, yes, there are some very definite impacts, and people need to be protected from these.

Senator REID. Mr. Robbins, I've been told on more than one occasion by the Navy that they have conducted studies on cattle and the sonic booms don't affect the cattle. Do you have any knowledge to the contrary?

Mr. ROBBINS. Well, that's very interesting. I've never seen the Navy riding a cow, but we're in the middle of something right now with the Navy. Late this summer we had a sonic boom of such great intensity in Dixie Valley at an extremely low level—we had two people on our place. At the time that it happened we were in town so we didn't see it. It broke some personal property of my wife which the Navy is paying for. However, we had a horse standing beside a ditch, apparently from the tracks, and the horse jolted at the sonic boom; it fell in the ditch and it broke its neck. The Navy has refused to even look at this situation. They said we can't prove it. Obviously, we can't; I wasn't on the horse, but it doesn't die by itself, and the tracks led to the ditch where it went in and it broke its neck. It died.

Obviously, they do, and the memorandum of understanding between the State of Nevada and the Navy, again that hasn't been followed because they were supposed to do a post- and pre-landing overfly supersonic, and they said because of monetary constraints they wouldn't do it. They only did part of it.

So I have some serious reservations about this, but one thing that I would like to bring up, if I may, a short bit: your bill, Senator, does not take into consideration when a complaint is filed against the military, whatever it is, the Navy or the Air Force. The complaint is filed, and because we don't have the name of the pilot and what he ate for dinner and his squadron, and everything else, we get a letter back from the FAA saying they're not going to look at it any further. I have yet to find any place in the FAA act, the CFR's, the VFR's to where I have to know the name of the squadron.

Senator REID. Well, I would ask, if you have an extra copy of the letter that you wrote and the answer you received, we will make that part of the record also. I think that's worth further inquiry.

Mr. ROBBINS. All right. If I could add an addendum, I don't have it all together yet, but if I could at a later date send you the addendum, I certainly will.

Senator REID. As I indicated, this record will be kept open and we will make sure that is part of the record if you send it to us.

Mr. Watson.

Mr. WATSON. Quickly, Senator, there was another incident involving a wholesale killing of livestock at East Gate. They were all burned. I believe there were about a dozen livestock.

Senator REID. When was that?

Mr. WATSON. Just about 3 or 4 years ago. To this day, we don't know what caused all these burns on these animals, but they were all dead.

Mr. ROBBINS. They belonged to Don Nonella. There were five of them.

Senator REID. Mr. Robbins, you said they belonged to whom?

Mr. ROBBINS. Don Nonella.

Senator REID. Gentlemen, thank you very much for your time and effort in appearing here.

Panel No. 5 will be Glenn Miller, Marjorie Sill, and Fred Wright. Would you please come forward?

The first witness will be Glenn Miller. Glenn, would you begin the testimony, please?

STATEMENT OF GLENN MILLER

Mr. MILLER. Thank you. My name is Glenn Miller. I reside at 581 Crayton Way in Reno. I've been active in several environmental efficacy organizations in the past 10 years, particularly the Sierra Club.

I strongly support Senate bill 1584, introduced by you, Senator Reid. Nevada has long suffered from military expansion on the public lands without the necessary consideration of all the costs and benefits from such expansion.

The NEPA process was designed to examine those costs and benefits in some detail and determine, of the various alternatives that are being considered, which would cause the least environmental risk or hazard compared to the one that may be the most desired.

At any rate, it provides some opportunity for the public to become involved in the process. That has not occurred to date with airspace designation, and particularly with withdrawal of several units of public land for exclusive military use.

The impacts that occur with military airspace withdrawal, particularly those impacts on humans living in the area, I think they were detailed very clearly by the previous panel, two of which actually live in that area.

But it is really an impact, and it is a health hazard to be angry all the time, to find yourself constantly being irritated by feeling impotent to the forces of the military. That is clearly a reduction in the quality of life.

There's also concern about safety and health of those who want to fly through the area. I think Dr. Bargain commented on that most clearly.

It also impacts on wildlife. Those impacts of scaring wildlife, of causing increased alarm have not been examined to the extent that they should have, and I think those, particularly in things like desert big horn which are tremendously threatened in our State, used to be very widely distributed, now are becoming fewer over the last several decades.

But then one I'm particularly interested in is the impacts on recreation. Nevada offers these tremendously special places where one can go and have an opportunity for wilderness-type recreation. While I'm not saying that an airplane flying over a wilderness area has a very significant—in fact, it is always going to be part of where anyone lives anywhere on earth—it is still the case that having a large number of military flights over an area that is a popular recreation area will definitely impact, adversely impact those uses.

The NEPA process will allow a complete review of all of these impacts and needs to be undertaken. I think this, your legislation, clearly would do that.

Another point that needs to be made is military needs on the public lands for training clearly will continue, but these needs will change. As the time evolves for those changing, it is very, very much a good possibility that the amount of land they need will be reduced. It is very much the case that as they come for reapplication for use of the public land, it may be denied, and it should be perhaps denied in many cases, depending on the needs and depending on the conflicting values.

In conclusion, I support strongly this legislation and encourage its passage and would gladly do whatever I can to insure that it does pass through the House and Senate and is signed by the President.

Senator REID. Marjorie Sill?

STATEMENT OF MARJORIE SILL, SIERRA CLUB

Ms. SILL. Thank you, Senator.

My name is Marjorie Sill. I am a resident of Reno, Nevada, and I am here today representing the Northern California-Nevada Regional Conservation Committee of the Sierra Club.

Over the past few years the Sierra Club has become increasingly concerned about the proliferation of airspace withdrawal in Nevada and eastern California and the cumulative effect of such blanket withdrawals on subsequent military air activities on rural citizens, on wildlife, and recreation. Because of this concern, the Sierra Club, believing that you're out to put your money where your mouth is, has entered into litigation, along with Washoe County, Nevada; Lake County, Oregon; and the Nevada Outdoor Recreation Association, to protest the Federal Aviation's authority approval of the Oregon Air National Guard request to conduct military operations in Washoe County, Nevada and adjoining areas in northeast California and southern Oregon.

At the public hearing on this issue, the FAA completely ignored the overwhelming opposition from citizens and non-military government officials in making their decision to grant this approval. I'm a firm believer in the statement that the salvation of democracy is the watchfulness of the citizen, but if the citizen is ignored, then there is no way that the democracy is going to function.

Consequently, we enthusiastically endorse S. 1584, a bill to assure compliance with the National Environmental Policy Act for any special-use airspace designation. This bill would counter the FAA position that it need consider only aviation in making a decision for special military use of airspace.

We also strongly support the provision in the bill that calls for a semiannual review of each special-use airspace which has been previously designated. Such a provision will insure that accumulation of unnecessary or undesirable airspace by the Department of Defense will not occur and that both cumulative effects and special area effects will be studied for each withdrawal made.

We wish to thank you, Senator Reid, for your sponsorship of this important legislation and to urge its passage by Congress as soon as possible this year.

I personally also want to thank you for holding this hearing in Sparks, Nevada. I retired a year or so ago as a 27-year teacher at Sparks High School just down the street, so I think this is very important.

Senator **Reid**. Fred Wright?

STATEMENT OF FRED WRIGHT, NEVADA WILDLIFE FEDERATION

Mr. **Wright**. Thank you, Senator. Welcome.

Senator **Reid**. Thank you.

Mr. **Wright**. I feel compelled to acknowledge your distinguished ad hoc panel which seems eroded away to all but one.

For the record, I am Fred Wright, legislative and issues representative of the Nevada Wildlife Federation, which is a statewide conservation education organization. We are here to support S. 1584 amending the National Environmental Policy Act of 1969 whereby designation or expansion of special-use airspace would come under the aegis of that act.

We feel Nevadans basically support a strong defense posture. Nevada over time has welcomed and cooperated in establishment of military facilities in the State. We understand the need for military personnel to receive the vital training necessary for them to carry out those missions.

We have, however, objected to the tactics used by the military establishment in some instances, such as Gru mountain range takeover. It is time that public participation in military growth in this State becomes a reality as proposed in your bill

Our specific concern, which your bill would cause to be addressed, is the special-use airspace setaside, not only our civilian flights impacted, but the State and Federal agency flights are hampered when gathering natural resource data necessary to manage those public values.

The NEPA process would offer an opportunity for mitigation of the potential airspace air safety problems survey crews could encounter due to the military flights. The proposed process also gives the public a better feeling of involvement.

Senator, we thank you and we hope you will hurry up before Dr. Bargain's map of Nevada is totally red.

Senator **Reid**. Thank you very much, Fred.

One thing that I didn't mention: the reason that this subcommittee is holding this hearing is that we have jurisdiction over the Council for Environmental Quality, known as CEQ. So any changes to anything that CEQ does has to go through this subcommittee. We also have jurisdiction over changes in the National Environmental Policy Act. Even though you may wonder why there is a subcommittee with the name that we have holding this hearing, the reason is that we have jurisdiction over NEPA and CEQ.

A couple of questions to members of the panel: Dr. Miller, I asked some of the earlier witnesses questions relative to their professions, what is your educational background? You have a "doctor" by your name. Could you tell us?

Mr. **Miller**. I have a Ph.D. in agricultural chemistry from the University of California at Davis. I am presently associate professor of biochemistry at the University of Nevada at Reno.

Senator **Reid**. You made a brief statement in your testimony, Dr. Miller, that it's your belief that mountain sheep populations in this State have declined. Is that true?

Mr. **Miller**. Certainly.

Senator **Reid**. Does it have anything to do with airplanes?

Mr. **Miller**. I think the major impact probably was from the mining industry and water, taking away their watering areas. But I think bighorn sheep are particularly susceptible during lambing to stress and impact. How one measures those impacts sometimes is the distance at which they run once they're scared. There has been some research done on various man-made impacts on large wildlife. I don't think those kinds of studies have been done under Nevada conditions, and I don't see them being done under Nevada conditions.

The military usually is under major time constraints when they want an area withdrawn and looks at existing data. I think it's time that they began to put their money where their mouth is and begin to fund some increasing amounts of studies under Nevada conditions if, indeed, as seems to be the case, they want to use a lot of Nevada airspace.

Senator **Reid**. Marjorie Sill, you commented about one provision in this legislation that talks about, in effect, that there would be a periodic study to determine if, in fact, the airspace was still being used by the military and, if in fact it were not still being used, it would be returned.

Ms. **Sill**. Right.

Senator **Reid**. Do you or any of the other panelists know of any airspace that's once been given to the military that's been returned?

Ms. **Sill**. I know of none.

Senator **Reid**. As I indicated, this record will be kept open. We have in the audience a number of people from various branches of the military, and I would be interested, as would the committee, in knowing if, in fact, any has been returned.

Senator **Reid**. Thank you very much, each one of you, for your time and effort on this issue.

The next panel of witnesses will be Brian Davey, representing the Nevada State legislature, committee on public lands; Abbey Johnson, League of Women Voters of Nevada; Frederick Hendy, Aircraft Owners and Pilots Association.

We had another panelist listed, but, in addition to his being an interested citizen and a private pilot, he's also an attorney. It's my understanding he's been stuck in court. We will, if the time allows at a subsequent time, have his testimony made a part of this record.

Mr. Davey?

STATEMENT OF BRIAN DAVIE, REPRESENTING THE NEVADA STATE LEGISLATURE

Mr. **Davey**. Thank you, Senator Reid.

My name is Brian Davey. I am a principal research analyst in the Research Division of Nevada's legislative council bureau, and I serve as the staff director for the Nevada's legislature's committee on public lands.

Nevada State Senator Dean Rhodes, chairman of the public lands committee, sends his regards and regrets that he is unable to testify in person at this hearing due to prior commitments. Senator Rhodes requested that I appear for him on behalf of the committee to provide the following testimony:

The Nevada legislature's committee on public lands has devoted extensive time and attention to the issue of existing and proposed land withdrawals and the designation and restriction of airspace by the military in Nevada. During the 1985-1986 interim period between legislative sessions in Nevada, the committee conducted hearings, heard testimony from representatives of the military and from citizens in Nevada relating to the airspace issue, and participating in the informal airspace hearings conducted by the Federal Aviation Administration concerning the designation of the Hart Military Operations Area in northwest Nevada.

Due to this involvement, the committee particularly became concerned about the apparent lack of procedures, control, and opportunities for public input over decisions by the military and the FAA to designate and restrict airspace in Nevada and throughout the Nation. As a result, the committee communicated its concerns to the U.S. Congress and Nevada's congressional delegation and recommended that the 1987 session of the Nevada legislature adopt a joint resolution to urge Congress to, No. 1, investigate the designation and control of military airspace by the FAA and, two, enact legislation to enhance public participation in the process of establishing airspace classifications and restrictions.

The 1987 Nevada legislature responded by adopting senate joint resolution No. 6, which includes these recommendations. The vote on this resolution was nearly unanimous with only one dissenting vote out of the 64 members in the Nevada legislature.

Due to the time constraint, I won't read the entire resolution, but it does follow the recommendations of the committee.

The Nevada legislature's committee on public lands has reviewed S. 1584, but has not taken a formal position on this legislation. However, S. 1584 appears to establish a procedure through the National Environmental Policy Act to provide opportunities for public participation in decisions to designate and restrict airspace. Whether this approach is the most optimum method is a decision for this congressional committee and the U.S. Congress.

We understand that the military is opposed to the method which would be established under S. 1584. If that is the case, the Nevada legislature's committee on public lands would challenge the Department of Defense to recommend and implement an adequate and definitive procedure to allow public participation and the consideration of environmental effects in all future airspace decisions.

On behalf of the chairman and members of the Nevada legislature's committee on public lands, we would like to thank you and commend you for addressing the airspace issue, for conducting this congressional hearing in Nevada, and for providing this opportunity for the committee and the citizens of Nevada to express their views.

Senator REID. Mr. Davey, thank you.

Ms. Johnson?

STATEMENT OF ABBEY JOHNSON, REPRESENTING THE LEAGUE OF WOMEN VOTERS OF NEVADA

Ms. JOHNSON. Thank you, Mr. Chairman.

I am Abbey Johnson, representing the League of Women Voters of Nevada. I am here today to express the Nevada league's support for the Airspace Protection Act.

I have been aware of the controversial role of the Federal Government in airspace issues for several years, but it was not until I attended the FAA's hearing on the Hart Military Operations Area in Washoe County that I witnessed firsthand the frustrations of ordinary citizens in trying to make their concerns known to the FAA.

It is my understanding that this legislation will require the FAA to consider environmental issues in airspace designation rather than aeronautical factors only. This will be a major step forward.

The league approaches this issue from the standpoint of citizen rights. Clearly, at the present time rural Americans, including Nevadans, have not had a voice in the decisionmaking process regarding the withdrawal of airspace for military use. We have learned from the residents of Dixie Valley and other residents of rural Nevada the negative impact that airspace withdrawals have had upon the lives and livelihoods of innocent citizens.

We support the bill because it provides for participation by citizens in the decisionmaking process. By requiring the FAA and the Department of Defense to fully adhere to the process and procedures of the National Environmental Policy Act, the legislation will certainly guarantee a role for concerned citizens in the decisionmaking process.

The passage of this legislation will send a message to the FAA and the DOD that Congress wants them to be concerned about the rights of citizens and that these agencies must consider the human environment and the cumulative impacts of proposed airspace withdrawals upon people.

Congress' approval of this legislation will also send a message of support to rural America, to the many patriotic citizens who are enduring disruptions to their lives because of airspace withdrawals. To those citizens, the message is that Congress cares both about defending the country and protecting the individual rights of its citizens.

Clearly, this is a first step toward addressing the inequities that have been established throughout the years of airspace designation without consideration of the human environment. The league and other groups will be watching this issue and the actions of the affected Federal agencies to see whether Congress' message was heeded.

We are pleased to go on record in support of the Reid Airspace Protection Act, and we expect that its passage by Congress will afford citizens the opportunity to be informed and to participate in decisions that affect their lives.

We appreciate the opportunity to express our point of view and thank you for holding this field hearing.

Senator REID. Thank you, Abbey.

Mr. Hendy?

STATEMENT OF FREDERICK HENDY, REPRESENTING THE AIRCRAFT OWNERS AND PILOTS ASSOCIATION

Mr. HENDY. I have a short statement for you, Senator Reid, and the committee.

My name is Frederick Hendy. I am a resident of Carson City, Nevada and have been since 1979. I am a member of the Aircraft Owners and Pilots Association—that's the AOPA—a national organization for the purpose of advancing and protecting the interests of its membership.

Mr. John L. Baker, president of AOPA, and Mr. Joe Croddy, western district representative of the AOPA, have asked me to represent them as the AOPA at this hearing because they were unable to attend. Mr. John L. Baker, president of the AOPA, has a prepared statement on the position of the AOPA with regard to Senate bill 1584 and has asked that his statement be admitted into the record for this hearing.

Senator REID. That will be the order.

Mr. HENDY. This statement from the Aircraft Owners and Pilots Association explains the positions in detail and carries the support of the AOPA for the provisions of Senate bill 1584. Compliance with the regulations of the National Environmental Policy Act and semiannual review of special-use airspace will assure that special-use airspace applications will receive a public hearing with the input from all parties that may be affected by such airspace restrictions.

I would like to quote one paragraph from the summary contained in this statement in order that those in attendance at this hearing may have an understanding of the position of the AOPA.

> Improved short- and long-term airspace planning is critical today due to increased demands for airspace and access to all users. Coordination among military services and with civilian airspace users, primarily the FAA, State governmental agencies, and civilian aviation users, must be a priority in order to achieve efficient joint use.

Thank you.

Senator REID. Mr. Hendy, thank you very much.

I, first of all, in response to the testimony that you gave, Mr. Davey, would like you to mention to Senator Rhodes that during the time that I was in the House and the short time that I've been in the Senate he's been most cooperative, and the public lands committee from the legislature has been very good at keeping me informed as to what the State's doing. I have attempted to have most of your meetings, which you hold in the State of Nevada, covered and I think that's important because most of the issues that you deal with—I should say a lot of them—are federally related. So I've appreciated the good work that you've done for the State working with this committee for the time that I've been in the Congress.

More specifically, SJR 6 from the Nevada State legislature, you weren't given time to describe fully what that resolution does. Would you take some time now and explain to the committee what SJR 6 does?

Mr. DAVEY. Senator, did you want me to read the resolution? It's not a long resolution. I could just read it very quickly.

Senator REID. Well, either read it or explain it, whatever you feel would be more appropriate.

Mr. DAVEY. Basically, the resolution starts out by summarizing the situation as perceived by the public lands committee as a result of the testimony that the committee has received, and it expresses that the residents of Nevada have questioned the designation of additional airspace for military use when the Department of Defense and the Federal Aviation Administration apparently fail to enforce the limits on the area and the altitude of existing designations of airspace. The resolution also expresses the feelings, the extreme frustration and the feelings of powerlessness that have been expressed to the committee and to the legislature over the inability of citizens to express their opinions before decisions are made. Then the resolution resolves that the Nevada legislature urges Congress to investigate the designation and control of military airspace by the Federal Aviation Administration, and we understand that the General Accounting Office is conducting such a study.

The resolution further goes on to say that the legislature encourages Congress to enact legislation to enhance public participation in the process of establishing classifications of airspace and restrictions on its use.

Senator REID. Have you had comment from any branch of the military, the Department of Defense, on this resolution passed by the State legislature?

Mr. DAVEY. The committee has not had any direct comment from any agency of the military. The committee, at its last meeting, took a tour of Nellis Air Force Base, becoming more familiar with their operations, and did discuss at various points during the visit with the officers at Nellis, and at that time were informed that there was some opposition to this proposal on behalf of the military.

Senator REID. Mr. Davey, were you at that time given any indication of why the opposition existed?

Mr. DAVEY. Again, we haven't had any formal explanation, but it's my understanding because of the increased procedures and it would be a more time-consuming procedure for the military to undertake. That's my basic understanding.

Senator REID. Abbey Johnson, is there any chance that the national league would take a position on this legislation?

Ms. JOHNSON. I don't know, Senator.

Senator REID. Because, as the testimony has indicated and some of the maps behind me indicate, this really is a national problem.

Ms. JOHNSON. It is. The current focus of the league at the national level is to target in on several issues and just work at those despite the many positions that we have on many issues. So I think it's unlikely at the national level that this would become a priority.

Senator **Reid**. If there is anything that we can do in the State of Nevada to assist you in making this a priority, we'll do it.

Ms. **Johnson**. Okay.

Senator **Reid**. If you would remain seated while David Hornbeck, who was supposed to be part of this panel, comes forward. He just walked in.

Mr. Hornbeck?

STATEMENT OF DAVID HORNBECK

Mr. **Hornbeck**. Thank you, Senator.

Senator **Reid**. I would have him be here alone, but that wouldn't be fair.

State your name and proceed, please.

Mr. **Hornbeck**. Good afternoon, Senator. My name is David Hornbeck, and I appreciate your allowing me to slip in at the last like this. I had to go to court this afternoon. I was delayed.

I'm a resident of Reno and I have been a life-long resident of Nevada. I am an attorney, but today I'm speaking as a private citizen and not as a representative of anyone.

I welcome this opportunity to testify in support of your bill, S. 1584, the Airspace Protection Act. As a former naval officer and pilot, I'm fully appreciative of the need for military training and the need that that creates to use a sufficient and appropriate amount of our national airspace for those training exercises.

However, as a private pilot, I'm also appreciative of the conflicts that can and do occur between civil aviation and the military use of our national airspace. In addition, the national use of airspace by the military can also create impacts on the underlying surface environment which interferes with and in some cases can even destroy the beneficial uses of our lands, both public and private, that lie below the airspace above.

Particularly military aircraft noise, including sonic booms which occur daily over both public and private lands, including our national parks, wilderness areas, wild and scenic rivers and other areas can have these damaging effects. This military noise has created problems and can actually destroy the purpose for which some of these areas have been designated by Congress. This can destroy the enjoyment of wilderness areas, for example, and completely ruin the experience free of noises and disturbances of the urban environment that people go to those areas to seek, including the same in our national parks.

Even injuries have been known to occur due to the startle effect of pack animals and the others, and I'm sure you've heard about those in more detail from others today. But the point is that there are significant impacts to the surface area below.

The thing that's most disturbing to me, however, is the process by which the military presently acquires these special-use airspaces for their operations. Under the present scheme, the proposing agency merely has to apply to the FAA for the designation of airspace and it's an internal matter between agencies. This will commonly involve a request for a designation of military operations area for military training flights to be conducted within certain particular vertical and horizontal bounds, but these are also used by civilian pilots as well and oftentimes many conflicts can occur.

Typically, the proposing agency will merely certify to the FAA that it has complied with the National Environmental Policy Act, and the FAA typically makes no independent investigation of the matter as to whether or not environmental relating to that designation have actually been considered.

In effect, the policy decisions to designate airspace which affect all users of both the air and the surface below are deferred by the FAA to the military proposing user agency. The FAA takes the position that the user agency, not the FAA, is responsible for considering any environmental impacts or the implication of the designation of that area. As far as I know, there's no formal requirement that the proposing user military agency include the affected public in that decisionmaking process.

This total disregard in the existing process for environmental concerns of citizens with respect to these actions which so profoundly affect their use and enjoyment of the land below our navigatable airspace I think is fundamentally wrong. The FAA, the ultimate decisionmaking agency with respect to the designation of these airspaces, I think must be made to be responsible and accountable to the concerns of the affected public. The FAA must be made to see that adequate environmental documentation is prepared and that the public is included in the environmental review process so that all of these concerns can be considered.

At the present the FAA appears to be completely indifferent to——

Senator REID. I think your time is just about up.

Mr. HORNBECK. Okay, I'm about finished.

The only thing I would like to add which is not included in my written remarks is the point that at the present the only avenue for public concern, effective action, where there is an impact that affects them is apparently to sue the FAA and the military, and so forth. I think this basically is an ineffective way to regulate these matters.

So I want to fully support your legislation, and I urge that the committee favorably report it out to the Senate.

Senator REID. Does any member of this panel know the status of the litigation involving airspace withdrawals?

Mr. HORNBECK. I, as an attorney on one of those cases can tell you, at least as to one.

Senator REID. Would you do that, please?

Mr. HORNBECK. The Hart MOA——

Senator REID. That was the one I was concerned about.

Mr. HORNBECK [continuing]. In northern Nevada, as you're probably aware, a suit was filed against the Department of Transportation and the FAA by an interesting group of people—Washoe County; I forget which county it is, Lake County possibly, up in California and Oregon; and also the Sierra Club; and the Nevada Outdoor Recreation Association.

A motion to dismiss was granted in the district court. That has been appealed to the Ninth Circuit Court of Appeals and we'll see what happens at that point.

Senator REID. For completing the record, it's my understanding that, in addition to your being a civilian pilot, that you were a military pilot; is that right?

Mr. HORNBECK. Yes.

Senator REID. So you've had experience on both sides of the fence?

Mr. HORNBECK. Yes.

Senator REID. Thank you very much, panelists, for your assistance with the committee.

The next panel will consist of Wally Runner, Roy Johndreau, and Frank Smith. It would be appreciated if these witnesses would come forward. The first witness testifying will be Wally Runner.

Mr. Runner, if you would give your name and also where you live, things of that nature?

STATEMENT OF WALLY RUNNER, CONSERVATION CHAIRMAN, SIERRA CLUB'S NORTH CAROLINA COASTAL GROUP

Mr. RUNNER. I'm Wally Runner, and I'm the conservation chairman of the Sierra Club's North Carolina Coastal Group. The Sierra Club, with more than 400,000 national members, is opposed to the misuse of airspace over lands by the military and nonmilitary organizations.

To lend some credence to the opinions that I'm going to express, it should be known that I supplied engineering support to the military services from 1943 to 1971 at Murak Army Air Field, Edwards Air Force Base, many U.S. service facilities and overseas activities in Vietnam, Thailand, Taiwan, and the Philippines.

At Edwards Air Force Base I was exposed to the impacts of jet aircraft low-level record speed runs and participated in evaluation of low-altitude performance flights by new Air Force, Navy, Army, and foreign aircraft. I flew it on the deck levels at speeds approaching sonic velocity and I witnessed the initial low-level sonic boom property damage demonstrations.

I would relate my presentation to a current military operating area withdrawal attempt over 152 square miles of Cape Lookout National Seashore Park and 620 square miles of North Carolina's coastal land area. As that graphic map shows, more than 5200 square miles of airspace above North Carolina's 250-mile coastal shoreline region is controlled by the military for training MOA's.

Some contiguous MOA's, some that butt together are used independently by aircraft in the same branch of the service. Additionally, a massive network of IR and VR military routes crisscross into, out of, and across the State. In spite of the current immense military airspace expanse over North Carolina, the services are seeking seven added MOA's, presumably to satisfy training in advanced technology aircraft and weapons systems.

My focus will be on two of the MOA's initiated by the U.S. Marine Corps at Cherry Point Station, and I'll let you decide how it relates to Senate bill 1584.

Nine hundred and ninety-five square miles of Panacle Sound, Panacle River, Nuese River, and the surrounding shore regions, including the Department of Interior's Cedar Island Wildlife Refuge, have been withdrawn already by the Marines. This airspace is labeled "restricted area—R5306A" and is the current training range for the Cherry Point marine pilots.

In 1986 the U.S. MC entertained responses from 16 selected governmental agencies and four small, general aviation groups during a scoping process related to their plans to extend R5306A at its southeast and northwest boundaries. Nineteen environmental organizations active in the proposal areas were not consulted.

In January 1987 the U.S. MC issued a draft environmental impact statement proposing to withdraw airspace over 32 miles of the last undisturbed national biosphere reserve on the Atlantic Coast, the pristine Cape Lookout National Seashore Park. Subsonic flights were planned at 100 feet above 11 miles of the seashore park. Additionally, the proposal withdrew 750 square miles of space over the upper Panacle River and the Bongo River areas. The net range would be 32 miles wide at the Atlantic Coast and extend inland 32 miles wide for 69 miles.

In February 1987 two public hearings generated 100 percent opposition from all environmental groups, general aviation organizations, congressional, Federal, State, county, and city representatives, as well as commercial fish folk, hunters, boaters, fishermen, recreation, visitors, residents, and so forth.

In October 1987 the U.S. MC issued a final EIS correcting a few of the many flaws in the DEIS and offering to raise the minimum altitude over the park to 500 feet. Cherry 1 MOA was reduced to 620 square miles. That's the one on the northwest end.

The document did not explore the suggested half dozen alternatives using existing or less sensitive airspaces, but the FEIS user did expose the real reason for adding the MOA's to each end of R5306A: the Department of Defense will propose this airspace, the total 64 by 32 miles, for a mid-Atlantic electronic warfare range which will provide an all-services East Coast electronic monitor training range comparable to the Fallon-Yuma ranges.

The park flyovers have been condemned to every pertinent agency head from President Reagan down. North Carolina Congressmen, Senators, and the governor have written their strong opposition to the park's misuse. However, it is believed the Secretary of the Navy has already blessed the program.

The EPA had previously written no problem on noise, but rumor exists they may now be having second thoughts. Based upon its past track record, the FAA is expected to donate the requested space.

However, at this time the proposal has moved to the Council on Environmental Quality which has requested the Department of Interior's Park Service to negotiate with the Marine Corps and the FAA to try to resolve the flyover problem by compromise, or whatever.

It appears the future of Cape Lookout National Seashore Park is in serious jeopardy. It may become just another landmark on a pilot's low-level, high-speed, terrain-following system.

I describe the history of this base withdrawal to provide a contemporary example of the arrogant military's insistence of need in spite of inadequate homework, suggestions to prevent park misuse, and destructive impacts upon wildlife and the 275,000 residents and visitors below the airspace.

Please note that for brevity I have omitted the discussion of the severe negative impacts of the proposal. My purpose here is to indicate weaknesses in the withdrawal processes. This is an example wherein the legal advisors of the UMC state they had complied with all the requirements of the National Environmental Policy Act.

The attorney representing four major environmental organizations, citing case laws, pointed out seven major proposal items not in compliance with NEPA policy or regulations, but the military is charging on.

NEPA policies and regulations are not legally specific enough to prevent evasions or self-serving interpretations. Considering bill S. 1584 will require the FAA to be more responsible in enforcing NEPA, eliminate the evasion interpretation problem. It is difficult to believe with my experience that one agency's interpretation will not be adopted by another agency.

Thank you.

Senator Reid. Thank you very much for your testimony.

Roy Johndreau.

STATEMENT OF ROY JOHNDREAU, REPRESENTING NEBRASKANS FOR PEACE, CONCERNED TRISTATE CITIZENS, AND THE RURAL COALITION

Mr. Johndreau. I am Roy Johndreau from near Gordon in northwestern Nebraska. I operate a ranch with some farming. I'm also a big game outfitter. I am sponsored at this hearing by Nebraskans for Peace and Concerned Tristate Citizens in South Dakota, Wyoming, and Montana, and the Rural Coalition.

My family and I live in the Nibera River Valley under an Air Force low-level fight training corridor. My neighbors and I have witnessed many B-52 bombers and fighter planes in low-level flight below the legal limit of 500 feet. We have seen many planes flying in the river valley, which at my headquarters is about 140 feet deep. I manage farm ground and pasture above the valley and have looked down on many bombers. Some of them fly relatively high and could have been at or above 500 feet elevation.

At that time I thought that pilots of the high planes were neglecting their training. For years none of us questioned the wisdom, much less the legality, of these flights. If you can't trust the United States Air Force, who can you trust? But they sure were very low and very loud.

We finally became concerned enough to investigate and were very surprised to find that we were being had. The high pilots were piloted by very responsible trainees; the planes in the valley were hotrodders. I am sure many people testifying today can give similar testimony.

A point I want to make is the attitude of some people toward those of us who investigated and complained. The barroom generalization seems to be that anyone who complains about a military operation is un-American, a communist dupe, or just plain stupid. It seems easier to propagate loud-mouth, nasty talk than it is to dig out the facts.

The facts are that it is very dangerous to fly bombers down to 100 feet or so, and the military is breaking the law when planes fly lower than 500 feet. People who would support military actions, right or wrong, without question, are the ones who should be careful. The American democratic process depends on open expression of various points of view.

I and my associates are not accustomed to or comfortable with this sort of critical activity. It is very difficult for me to stand up and criticize the United States military, which I have obviously supported for so long.

I suspect that S. 1584 will result in just more laws for the military to ignore or maneuver around. However, I had a situation that could be eliminated. In communication yesterday with concerned Tristate Citizens I learned of a flight of about twenty B–52's who recently used a low-level flight corridor in Montana which has not been used for about two years. The bombers came through with no advance warning. Several of the people in that area use small planes in their ranching operations. They had more or less forgotten about watching for bombers. The danger here could have been lessened by semiannual review of this flight corridor.

Senator **Reid**. Thank you.

Mr. Smith?

STATEMENT OF FRANK SMITH, REPRESENTING THE LIBERTARIAN PARTY OF WASHOE COUNTY AND THE CAMPUS LIBERTARIAN SOCIETY, THE UNIVERSITY OF NEVADA, RENO

Mr. **Smith**. Good afternoon. I'm Frank Smith of Reno, here representing myself, the Libertarian Party of Washoe County and the Campus Libertarian Society, the University of Nevada, Reno. I am vice chairman of both organizations. This is my second year of graduate studies at UNR in history and political science.

We must find the proper context in which to debate the controversy over Nevada airspace. It is not valid to discuss the question in terms of Federal military needs, nor right for us to decide the matter by accepting what airspace the Federal Aviation authority will let us have. The airspace question is a constitutional question of sovereignty.

Even a brief study of American history will reveal our form of government is a federal, not national, republic. The Federal Government was created by the sovereign States for certain political ends with certain powers delegated in trust to it by the States. The powers and responsibilities of each party to the compact are spelled out in the Constitution.

Article I, section 8, of the U.S. Constitution only grants Congress the right of exclusive legislation over the area which would become Washington, D.C. and "like authority over all other places purchased by the consent of the legislature of the State in which the same shall be for the erection of forts, magazines, arsenals, dock yards, and other needful buildings."

Thus, neither Congress nor any Federal appendage can lay claim to one square rod of Nevada land or airspace without the consent of the State legislature. To admit of another method would be admitting a gross violation of the U.S. Constitution, the essence of

America's liberty, and the Constitution was designed to protect that precious jewel from Government abuses of power. Should we allow repeated transgressions of the letter, spirit, and intent of that document, we would soon have no Constitution worthy of the name.

While it may be true, as Jefferson wrote, "The natural progress of things is for liberty to yield and government to gain ground," it is equally true Members of Congress have taken an oath to uphold the Constitution. Perhaps they should be reminded of that oath before voting on this bill.

We support Senator Reid's Airspace Protection Act as a step in the right direction to correct the imbalance of power which now exists between the Federal Government and the State of Nevada. We hope this bill is successful. However, should it not be, it is hoped that Senator Reid will use the power and prestige of his office to notify his colleagues that Nevada is a sovereign State, not a political or economic colony, occupied territory, or ward of the Federal Government. Regardless of the vote on this bill in Congress, the question of Nevada airspace is a constitutional question of sovereignty, and the Nevadans cannot recognize a decision made unconstitutionally. As per Article I, Section 8, of the U.S. Constitution, the State legislature is responsible for making any final decision.

The Libertarian Party of Washoe County would like to warn Senator Reid that if sovereignty of Nevada is not respected in this and other current matters, the "natural progress of things" will be our citizens shall soon be made to kiss the rod" and liberty will expire within our State in our lifetime.

Thank you for your time and attention to your constituents.

Senator Reid. I want to bring to the attention of this panel a part of some testimony that was rendered on this bill on November 24th of last year before this same subcommittee in Washington. This is testimony of Lucinda Swartz, Deputy General Counsel of the Council of Environmental Quality. Among other things, she said:

> CEQ was asked by the General Accounting Office in May of 1987 for its opinion on the Federal Aviation Administration's compliance with NEPA with respect to the designation of special-use airspace. At that time GAO explained that in issuing special-use airspace designations the FAA simply verifies that the military agency requesting the designation has certified that it has complied with NEPA. The FAA prepares no EA or EIS, nor does it review any environmental documentation prepared by the requesting military agency.

The reason I bring that to your attention is that the purpose for this legislation isn't something I dreamed up. The purpose of this legislation is a result of people being concerned about what's happening to airspace in this country.

I waited to make this comment to this panel, which consists of someone from North Carolina, someone from Nebraska, and someone not from the mainstream of Nevada politics. I say that respectfully to each of the three of you because the purpose—and I would relate to Mr. Smith—one of the purposes of this bill is to bring out citizen participation, which as I understand some of the framework of your party's views that's important.

I would also indicate to you, Mr. Runner, that we've received real cooperation from the members of the North Carolina congressional delegation. Senator Terry Sanford is a cosponsor of this bill. The GAO report that we've heard so much about here today was requested by Senator Jesse Helms. He's indicated support for this legislation. So, as a Senator from the State of Nevada, we appreciate your being here and making this more than a Nevada issue, because it is more than a Nevada issue.

If you look at a map of the United States behind me, it certainly is more than a Nevada issue, as to you, Mr. Johndreau, this certainly is more than a Nevada issue, as indicated by some of the experiences you have had in Nebraska.

I again state, as has been stated by witness after witness here today, no one is here to brow beat the military. The military needs airspace for some of their maneuvers. What we're saying is let's set some guidelines for the future taking of military airspace, and also set some guidelines that when they don't need it any longer, let's get it back.

I appreciate very much your traveling the many thousands of miles you did to come here and participate with us in Sparks, Nevada.

The final panel before the subcommittee will be Alice Williams, Glenn B. Wasson, William Rosse. William Rosse will represent the Western Shoshone Nation. Also, the final witness will be——

Ms. WILLIAMS. Katchanese Katunee.

Senator REID. You took the words right out of my mouth.

Ms. WILLIAMS. I knew you couldn't pronounce it.

Senator REID. Alice Williams will be the first witness today.

Do we have the names reversed? No? It's right? You were helping out with somebody else's name? You were telling me how to pronounce her name.

Ms. WILLIAMS. Yes.

Senator REID. You could have done that yourself.

Ms. WILLIAMS. He was stumbling over that; I could see that.

Senator REID. Did she do a good job of pronouncing your name?

Ms. KATUNEE. Of course.

Senator REID. Alice, you'll be first.

STATEMENT OF ALICE WILLIAMS

Ms. WILLIAMS. All right, thank you.

In the name of peace, Nevada's airspace is becoming even more polluted. I say more polluted because the number of commercial flights is increasing along with the population, and the flight paths of these commercial planes already crisscross Nevada 24 hours a day, year in and year out.

The commercial flights alone pollute the skies. Consider the emissions that come from airplanes. A study made by the Air Quality Task Force of Truckee Meadows showed that 1.2 percent of carbon dioxide is released from both the landing and taking off of aircraft at the Reno Airport. Of this 1.2 percent figure, 50 percent is made by military aircraft due to the fact that their planes used in this area are quite old and built for performance.

Truckee Meadows is a very small part of Nevada. Multiply the emissions statistics for this small area by the number of aircraft in our Nevada skies today and let your imagination do the rest. These emissions must drop somewhere on earth, a part on Nevada and the rest elsewhere.

I would hope that some agency would study this emission. I would hope that this agency would study this emission poison as it pertains to the ozone layer as well.

A friend, Stanley Smart, of McDermott, Nevada told me that his reservation is being disturbed by low-flying aircraft. He described the aircraft as being camouflaged in color and that they are big like cargo or transport-sized planes. He estimated that the planes fly between 400 and 500 feet above him in warm weather, but that in the winter time they do not fly so low.

Stanley said their small children and their animals were especially frightened of these aircraft and their accompanying noise. We can only imagine what it does to their animals and their children who live in the wild.

Stanley also reported that these low-flying aircraft had made it very difficult for them in performing their sun dance ceremonial held yearly in July. He said the aircraft fly over, about three or four of them, every hour. I suspect these must be the bombers that we discussed at an Air Force hearing held in Sparks, Nevada on May 26, 1986. The Air Force representatives informed us at that time that they were awarded $4.5 million to conduct an environmental impact study on low-level flying aircraft. They informed us that their report was for information only and that the report would go to no one in particular.

At another hearing regarding the Yuka Mountain repository, it came out during Mr. Robbins, formerly of Dixie Valley and who testified earlier this afternoon, during his testimony that some sonic booms were registered in Reno on the Richter scale. He didn't remember, but I recollect that some sonic booms have registered as high as 5-plus on the Richter scale.

Mr. Robbins also informed me this afternoon that the geothermal industry around Dixie Valley is rocky due to the shaking of the earth by sonic booms. Dixie Valley is located on an earthquake fault, a tectonic plate that could set off earthquake activity.

In the memorandum of understanding between the State of Nevada and the Navy, it stated there were supposed to have been health studies done. Now at Dixie Valley there can be no health studies as all 26 families are—well, they're not available because they had to move out of Dixie Valley.

I bring this in because he didn't have enough time, and I wanted these two things because you're on the environmental impact panel, or whatever you call it, in Washington. I wanted to bring these things up to you during my testimony so that possibly you can make a recommendation that a lot of environmental impacts should be done in the State because of our volcanic and earthquake and other many, many things here in the West that you don't have on the East Coast, and probably most Easterners are not aware of any of these things.

I end my statement my saying that I am very sorry for what little wildlife we have left, our outlying peoples, and our Mother Earth for having to be abused in the name of peace.

Senator REID. Thank you very much, Ms. Williams.

Ms. WILLIAMS. Thank you very much.

Senator REID. I'll ask some questions after all the statements have been given. Save your answers.

Ms. WILLIAMS. All right.

I'm retired from the Veterans Administration after 33 years of service. I have been very active since I was 25 years of age in many, many activities beginning with Indians, but now we end up trying to save our environment.

Senator REID. Thank you very much.

The next witness will be Mr. Wasson.

STATEMENT OF GLENN B. WASSON

Mr. WASSON. Not "Mr."—just Glenn.

I'm Glenn Wasson. My father's name was Tom Wasson. His mother's name was Sadie Wasson. Her dad's name was Natsie. His dad's name was Winnemucca. My grandmother's name was Saupway. She was Shawshonee. I am Pioutxe-Shonee.

We have had a lot of training in our early training. In 1942 I went in the U.S. Marine Corps. There I was shot. I was wounded on the island of Guam and wounded twice on the island of Iwo Jima because walking wounded were not taken off the island. You only went off there on a stretcher.

We're fighting for democracy. Now this big line that they told us in 1945. We had just fought the axis powers. Fascism, police states, and all of this stuff that we fought for, it seems that the United States Government is now doing to its own citizens.

In our early training we are taught we had to respect life because this is the only planet that we have. We have no other planet. The Great Creator said, "This is yours. Keep it well. Don't make her sick." This goes for all life, not just humans, all life, because we are not judges. There's not one man on this earth that the Great Man put here as a judge. He's the Judge. If He put all life here, that life should be respected the same as your brothers and sisters, because we all have same, common ancestor and that's Him. Believe that or not, that's a truth.

On November 1986 my wife was going from Susanville, California to Burnie, California on Highway 44. She was buzzed there by one of these planes that you hear about. The plane was so close that when it banked she could see a space in the cockpit.

Senator REID. What was that date again?

Mr. WASSON. November 1986. That corridor is up there on that map.

Nowhere is there a sign on that highway that says, "Danger—low-flying planes." Nowhere in the State of California was there any hearing that says, hey, we're going to have some airspace here.

In Hoopa, California—way over there where the eastern-most red is or western-most red—children are becoming neurotic because of the planes going right through the valley. It is a very steep valley, and the sound just reverberates. The children are crying for nothing, wetting their pants, and all sorts of bad things.

Hearing after hearing has proven that all of these sonic booms and noise associated with these jet planes is adverse to human living. It's adverse to health. Everything about it is adverse to humans. We also know that if it's adverse to us, it's adverse to every other living thing on this earth—the deer, the rabbits, the squirrels, the badgers. All of the things put here by the Great Creator are all jeopardized.

What happened to that 1945 thing, the democracy that we fought for? Why is it that we cannot express ourselves anymore? Where is that democracy we're supposed to have fought for and bled for?

The Indians of Nevada suffered a 25-percent casualty rate in that war. Our casualties were greater than most casualties of the nations of the world, including the Jewish people. I'm only one that was wounded; we've got many dead.

Nobody listens to us. What did we fight for?

Senator **Reid**. Thank you.

Mr. Rossee?

STATEMENT OF WILLIAM ROSSEE, SR., REPRESENTING THE WESTERN SHOSHONE NATIONAL COUNCIL

Mr. **Rossee**. I want to thank you for the courtesy you showed us in Washington, D.C., when we visited your office.

I'm here. My name is William Rossee, Sr. I'm chairman of the environmental protection committee, a member of the Western Shoshone National Council. I'm here on behalf of the Western Shoshone National Council.

The Western Shoshone Nation opposes the withdrawal of airspace over the Shoshone Nation. As you well know, the Western Shoshone Nation is still in negotiation with the United States Government over these lands. We feel while we are in negotiation there should not be any withdrawals over our lands.

The U.S. Government can show no proof on how they obtained the land. The Supreme Court could not say the land is not ours. The higher court referred it back to Judge Thompson's court in Reno, which has ruled that the Shoshone still have possessive rights to the land. This was in the summer of 1986, and Judge Thompson's decision was dated September 15, 1986.

We also had a hearing in San Francisco on December 15, 1987 regarding the *Dan* case. There was no decision there by the three-judge panel. We do not know when they will make a decision.

The U.S. Government has already crisscrossed the United States with restricted airspace, and we feel it does not need any more, especially over our lands. The Native American is the one who suffers most because of the failure of the U.S. Government to recognize that we are people too. They feel that Indians don't count.

Low-flying jets and sonic booms have been recorded over many Indian reservations in Nevada, Arizona, Utah, Texas, New Mexico, the Dakotas, and Montana as well as over Indian lands in Canada.

Again, I say we are opposed to these airspace withdrawals, and I thank you.

I'm sorry I did not receive a copy of your bill on the airspace issue. I would like to receive one of those, sir.

Senator **Reid**. We can give you one today.

Mr. **Rossee**. All right. I'd sure appreciate it.

Senator **Reid**. OK. Next is Katchanese Katunee.

Ms. **Katunee**. Katunee.

Senator **Reid**. Close.

You should have helped me, Alice.

STATEMENT OF KATCHANESE KATUNEE, REPRESENTING THE SACRED RAINBOW CIRCLE FOUNDATION

Ms. **Katunee**. I represent the Sacred Rainbow Circle Foundation, which is 4,000 people and growing. We concern ourselves with the education that has been so lost for so long as it relates to respecting Mother Earth from the cradle to the grave.

None of our environmental problems would be to the life-threatening state that they are now in had we had another form of education that embraced and respects an Indian culture. To this day, if you examine every college that is respected so much by the white culture, you will find that the least amount of students are directed or interested in involving themselves in getting degrees in environmental awareness or ecosystems. This is the organization that I represent, and I live and breath to build a college that suffices this need.

Senator Reid, you said, "Is it really true that a human being is affected?" All I can tell you is that five years ago I lived in Sparks on Merchant Street. I came to Nevada nine years ago with a normal blood pressure. I am 53 years old. I lived in a house where the flight pattern was very low, and my son used to joke and say that he, too, could wave to the pilots. My blood pressure went from normal to 230 over 130. I was admitted to the cardiac care unit. I solved the problem by some other knowledge and taking some herbs and moving out of that particular house.

But the awareness of people as to the danger that it promotes and feeds into one of the leading causes of death—there should be at your fingertips, Senator Reid, a real interesting study that begins to correlate the incidence of high blood pressure along with the flight paths, for there is, without a doubt, enough documented medical evidence which proves that low-flying aircraft not only affect, but cause high blood pressure in human beings.

The military and commercial flights then contribute to one of America's leading causes of death. The sonic booms affect our pregnant mothers, and, thus, the unborn child, our wildlife, and our atmosphere.

In Nevada, a place of high-cost hospitalization and insurance rates, we should all know that the actions taken by military choice of low-level flight patterns can and will impair the good health of us all.

Recent Supreme Court rulings and governmental agency response indicate that no group will assume responsibility for their role in contributing to the illness or death of people, the awesome damage to Mother Earth, her creatures, and the atmosphere.

I speak today to remind all that our future in generations to come must not be ignored by a persistent, arrogant ignorance personified by pilots and those who give the orders governing their conduct.

I, too, was in the service. I am a registered nurse. I have seen the correlation, and it needs to be addressed so that there is a space for the military to practice their maneuvers, but that not so arrogantly and flagrantly think they have a right to do whatever they want to do because they wear a uniform of the United States of America.

Senator **Reid**. Thank you very much. Perfect timing.

A couple of questions: Mr. Wasson, where do you live?

Mr. **Wasson**. I live in Susanville, California.

Senator **Reid**. You didn't make that clear, and I wanted the record to reflect that.

Mr. **Wasson**. The reason I made that reference is because, due to the United States Government under docket 87 of the United States Claims Court, Susanville, California, is part of Nevada.

Senator **Reid**. We'll take it.

Mr. **Wasson**. The first Governor of the State of Nevada was Isaac Rupe who came from Susanville, California. This very town of Sparks was in Rupe County prior to the drawing of the line in 1866.

Senator **Reid**. That's interesting.

Mr. **Wasson**. The old line used to go along the Sierras.

Senator **Reid**. One of the reasons we're holding this hearing is so people can express themselves; so that in the future you shouldn't say you didn't have an opportunity to express yourselves.

Mr. **Wasson**. Yes. We're very happy to hear that.

We're always last. When it came to the MX, guess who was the last one to be informed? Mr. Rossee has told you that case after case before the Supreme Court and all through the West here, Shoshone title is still intact.

Senator **Reid**. Mr. Wasson, your testimony has been interesting and informative, and I've enjoyed this panel, but I promised Alice that I would ask a question so that she could give an answer.

Why don't you give me the answer first?

Ms. **Williams**. I'm Shoshone-Piutte. I didn't put that on record.

Senator **Reid**. Okay.

Ms. **Williams**. Thank you.

Senator **Reid**. Did you have anything else you wanted to state, because I told you I'd ask you a question and you said you had an answer you wanted to give me?

Ms. **Williams**. No, I think that our panel members brought out most everything.

The American Indian, because this is his country and it's his only country, is probably more aware of these things than most citizens are. I believe this.

Senator **Reid**. As I indicated, I appreciate your testimony. I really have appreciated the testimony of all the witnesses. The record is from a field hearing. A field hearing is as it describes—it goes out into the field, and in this case to the State of Nevada where we've attempted to gain evidence.

As you know, there's another part to this State, the southern part of the State. I wish I had the time to hold a hearing in that part of the State because, as you know, there's a large military presence. It's been there for a long time. I have a very warm feeling about Nellis Air Force Base because it was named after a man from the town of Search Light, Nevada, my home town.

I wish we could have held hearings down there. I hope we don't have to do that. I hope this legislation moves along quickly enough that we don't need a lot of other hearings.

I appreciate everyone being here, and the courtesy that people extended to me by sticking to the three-minute time limit. I also want everyone to understand that the official record of this hearing will remain open for two weeks from this day for those who wish to submit additions to the statements that they have given or other people who wish to add to this written record.

The meeting of this subcommittee is now adjourned.

[Whereupon, the subcommittee recessed, to reconvene at the call of the Chair.]

[Statements submitted for the record follow:]

RURAL COALITION

TESTIMONY

SUBMITTED BY

MILITARY ISSUES TASK FORCE

THE RURAL COALITION

SENATE FIELD HEARING

MILITARY USE OF AIRSPACE

JANUARY 14, 1988

2001 S Street, NW, Suite 500, Washington, DC 20009/(202) 483-1500

Senator and field hearing participants:

I am Marla Painter, Director of the Military Issues Task Force of the Rural Coalition.

The Rural Coalition is a national alliance of over 140 organizations dedicated to the development and implementation of public policies which will benefit rural Americans, especially those who are poor or otherwise disadvantaged. The Military Issues Task Force is working to increase rural Americans voice in the Pentagon's decisions that affect their lives daily.

On behalf of small citizen groups and individuals from many regions of this country, we wish to offer testimony to support efforts to relieve ongoing abuse by our own military against rural people, specifically Senator Reid's introduction of Senate Bill 1584. For three years we have been working closely to assist rural citizens in their struggle to maintain their physical and mental health, their homes and in many cases, their economic base in the face of habitual and abusive treatment by military training in the airspace over their homes.

The struggle begins with the lack of acknowledgement by most public officials that there is a problem. Secondly, unless one has experienced the low level or supersonic military aircraft training in close range to people or animals, it is impossible to adequately describe the threats such training poses. Third, there is a lack of scientific data examining the clinical, long range physiological impact of this particular stress to people and animals. What data exists has not been organized in a coherent manner that presents a solid case to support what people know is happening to their health. Last, there has been no way for citizens to participate in making decisions about where the military can or cannot train. It has been as though the Department of Defense is excluded from the law and that airspace has no relationship to the land below it. Further, there has been an inherent attitude of the Federal Aviation Administration and the Department of Defense that because rural people populate the land sparsely, they do not count and are expendable citizens; invisible citizens. It is this arrogance on the part of the FAA bureaucracy, the military establishment and finally, the pilots themselves, which has enraged and mobilized rural citizens of all political perspectives.

In order to present you with an accurate picture of the situation, we would need to take you to the rural places affected by military air activity. Because we cannot do that, imagine tending your livestock or fishing offshore and having a jet fighter very suddenly 100 feet over your heat at 500 mph, preceding the unimaginable sound it leaves behind. Your entire body goes into an immediate, involuntary state of panic, terror which leaves you shaken, exhausted and feeling invaded. Imagine being on horseback and having to deal with your terrified animal, as well. Imagine seeing the flow of the engine, feeling the heat and remembering a glimpse of a smiling pilot. Although this sounds unlikely, an exaggeration of an occasional incident, it is in fact a daily occurrence in the rural parts of our country. The most quiet, most peaceful parts of our country. There are low level routes over interstate highways, rural towns, sacred Indian sites, farm homes, rivers, schools. Further, we have repeated reports that pilots fly off-route by eight to ten miles regularly. People who live near a known low level training route can expect that they will be buzzed unpredictably, but they never know when or where. Their complaints to airbases are met with questions about what model the aircraft was, which service, which squadron, what the number on the wing tip was, how low, at what speed it flew. These questions are impossible to answer unless one is trained to observe such things. Most people simply feel violated and hopeless about preventing it from happening again.

Now, imagine having your home, the ground and hills around you blasted with a force, a crackle, a strange sensation of overpressure which can come only from a sonic boom. You never know when it will hit. It breaks things in your house, cracks the foundation, endangers mining shafts, wells. Mostly, it is another terrifying physiological shock which can affect a person's nervous system and sense of well being. And it is impossible to accurately describe the discomfort it causes.

There are other consequences or unregulated military airspace use which we, as civilians, know less about but which are frightening. Electromagnetic radiation emitted by the aircraft and scoring stations is one threat. The information on EMR that has been publicly released is seriously health threatening and we are beginning to generate more inquiry on these health effects. Another unknown but suspicious hazard is the laser technology used for guidance. There have been some ghoulish, odd and unexplained occurrences which some people feel might be attributable to laser technology. People are branded crazy when they insist on getting explanations about unexplainable animal burns, occurrences of air in rural places becoming highly electrified, as though they are in an electromagnetic field. These descriptions sound loony but scientists who work for the defense contractors tell us (off the record) the ways in which these occurrences can be rationally, scientifically explained. Each explanation is linked to experimentally or currently used weapons technology. But it is not public knowledge. Hence, the military agency denies it occurs and respectable citizens are made to feel like people who are crazy. We aren't suggesting defense secrets be made public knowledge. We are suggesting that they should not be used on civilian populations or landscapes.

I present this small slice or a scenario that is increasingly unfolding for us at the Rural Coalition. We are disturbed because what is happening negates the very purpose of our military service. When we begin to utilize our military ability against our own citizens -- even in the name of training -- we are stomping on the ideals which set us apart from other governments. The citizens with whom we work are not opposed to appropriate use of airspace and land to assure our national defense. They are saying it must be done in a way which is consistent with the ideals embodied by our form of government.

Frankly, most of the citizen groups involved in the airspace issue would like to see large tracts or low level routes be withdrawn for military use only by Congress. In this way, they would have a representative voice in the decision. In lieu of such an "Engle Act of the air", we have assessed unqualified support for Senator Reid's S.1584. Its strength lies in the opportunity it provides people for participating in deciding where military use of airspace should occur. It requires looking at the consequences of using specific areas and it acknowledges that when airspace is used, that its use intimately affects the land and life below. Finally, the bill addresses the problem of the military holding control of airspace which it does not necessarily need. It presents the possibility for tightening up accountability and eliminating the open ended accumulation of airspace by the Department of Defense.

The Rural Coalition believes that without civilian involvement in the development of national security policies, including the operations of our military service, we are putting our collective democratic values and national integrity in a precarious and threatened position. By supporting S. 1584 we have an opportunity to begin to remedy inappropriate use of our skies and encourage appropriate civilian participation in formulating policy on military operations.

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Statement of Bob Fulkerson, Executive Director, Citizen Alert
Hearing on Airspace Protection Act--S. 1384
Sparks City Hall, Sparks, Nevada January 14, 1988

Greetings. My name is Bob Fulkerson, and I'm the director of Citizen Alert. Citizen Alert is a statewide organization founded in 1975 to help ensure public participation in decisions that affect the land and life in Nevada.

Like most federal issues which affect Nevada, citizens have had little opportunity to participate in military airspace decisions. A prime example of how citizens have been cut out of a military airspace decision is the Hart MOA. In October 1985, the 114th Tactical Training Fighter Squadron of the Oregon National Guard decided to take over a 900 square mile area of northern Washoe County for use as a Military Operations Area.

In spite of nearly unanimous opposition on the part of local affected people and private pilots, and the concerns of state agencies and environmental advocacy groups that the MOA could have an undeterminable impact on a number of Nevada Natural Heritage sites within the area, wilderness study areas and the Sheldon Antelope Range, the Air Force exempt itself from following the provisions of the National Environmental Policy Act (NEPA). The Federal Aviation Administration (FAA) had no desire to meddle in environmental impacts or citizen concerns affecting the MOA, and was happy to oblige the Air Force request.

This scenario has been repeated over and over again across the country to the extent that over 50 percent of the 48 contiguous states is under special use airspace.

(more)

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S. 1584 would put the onus on the FAA to force the military agency proposing the airspace withdrawal to comply with NEPA. This would greatly alter the FAA's autocratic methods. Citizens would finally be able to exercise thier democratic rights to participate in decisions directly affecting thier lives, provided the proponent does not receive a "categorical exclusion". Implementation to the letter of the proposed legislation of the semi-annual review by the FAA of every withdrawn airspace for military use would also be very useful in reducing the amount of unused, wasted military airspace.

The legislation would especially be useful to Nevadans because we are already home to an alarming array of aircombat war games and because we are continually being bombarded with demands for more military airspace activities.

For example, a round-trip VFR flight in "23Charlie" between Fallon and the Lincoln County Airport, which is 220 nautical miles southeast, will take a T-210 about three hours. Depending upon the course and altitude flown, you will pass through, along or into 2-4 MOA's, 2-3 SOA's, 30 Military Training Routes, 2 Strategic Air Command low-level bombing routes, 2-4 restricted areas and a cruise missile test route. The problems this creates for civil aviation are obvious. Less visible is the pain and anger felt by people below these areas whose health and livelihoods are being destroyed.

We urge Congress to vigorously enforce the legislation when it is passed. The administrators of the FAA have historically been unwilling to enforce the FAA's own rules regarding military airspace. These rules (General Operating and Flight Rules, Part 91, FAA) mandate minimum altitudes and against reckless flying, are are broken at any given moment from the Rio Grande to Hudson Bay. The FAA is unwilling and unable to redress these problems, and must constantly be birddogged by citizens, Congress and the courts to assure their compliance with the new legislation as well as the FAA's own rules.

The violence of low-flying jets and sonic booms has already destroyed Dixie Valley. Land, animals and people of Indian Nations and the states and provinces of the US and Canada are threatened with this same kind of violence on a massive scale. While we understand the individual pilot's need to be well-trained, we question the need for the massive increases on armaments and foreign adventures which trigger the expansion of yet additional supersonic, low-level and other military airspace activities. In addition to better coordination omong the military agencies, cuts in the military budget would also reduce the amount of hazardous aircombat training in our skies.

We support S. 1584 because it would expedite citizen participation in military airspace decisions and reduce the amount of piecemeal airspace withdrawals. It would also give Nevadans a voice in steering the state away from the tightfisted control of the Pentagon, and help return the solitude to our high desert mountains and wide open valleys.

Thank you for this opportunity to speak.

Most of my neighbors are gone now, and soon their homes, along with all signs of their toil will be extinguished forever. The wind now blows dust through empty houses that were once filled with people with warm smiles and friendly laughter. This valley shows little signs of a war, but there was one. It lasted five long years day in and day out, year in and year out, and the cost to preserve a way of life, individual freedoms, and a Republic, came dear to many.

For some, who were forced into this war, though they were guaranteed and protecred by, "Vested Rights and Equal Justice For All"., but found that those rights had been replaced by profound arrogence,inequality, and aborgation of responsibility. We can only wonder how many Dixie Valleys there are going to be in the future, in rural America? Will those people also be treated as second class citizens, to be used as experimental animals as we? The Navy had the reqisite intent and knew with a substantial certainly that their action would cause a detriment to the people inderlying those activities.

The United States Navy and their Supersonic Operations Area came into this valley in the summer of 1982, and fully intended to cause the people to abandon their land through continued harassment by buzzing everything that moved, vehicles, animals, tractors, school bus, and passing so close to our homes that we could see the pilots in their planes.

On the summers night of June 14th 1984, a flights of helicopers belonging to the Navy, attacked residents of this valley in their homes. An F-14 fighter crashed not far from a home, starting the desert on fire, the date was June 20th 1986. Two F-18 fighters bombed the Nevada ghost town of Fairview off the face of the earth, not far from here. We have to drive over fourteen miles through an electronic warefare range, filled with Electro-Magnetic-Radiation, pass by a laser range and a bombing range at the south end of our valley just to get to town which is seventy-five miles away. When the Navy bombs on another bombing range called Bravo-20, it causes our valley to shake like a lilly on a pond, and collapse our wells. Over five-hundred sonic booms have rained down upon our heads, blow out windows , moved and cracked walls, driven livestock from the range, killed animals , and shaken the very foundations of our homes. Cruise missels have been seen flying through our valley. Now the Air Force with its full complement of weaponry wants to use this valley also. B-52s, so big and so low, it seems as though you could almost touch them. F-111 EF-111A F-16 F=15, and many more to come, where will it all end. It seems like the beginning of Armageddon.

We are all well aware that our military needs to train to be the best, and with this we do not argue, for we want them to be strong and a formidable force for freedom, but, not at the expence of our own citizens. This country was founded upon laws to protect the rights and freedoms of the individual. To make a small segment of our society bear the entire burdan for the cost of freedom for this nation is a violation of those laws, and it violates the the oath those people in the Navy took which was, to uphold and support the Constitution of the United States. It is not a matter of bring unpatriotic or unamerican for not wanting to relinquish our land and our freedoms, because the orgin of the militay was to protect a way of life,not destroy it. We must ask however Mr President and members of Congress, who gave the Navy the authority to attack these Americans? For whose benefit were the lives devistated?

It is indeed a sad commentary that on the 200th anniversary of theConstitution of this country that such an event could take place. This nation, ~~above all nation~~, above all nations on this earth, has become the be~~acon~~come for hope and liberty, and people look to us for their salvation. We tell other countries in this world to improve their himan rights programs, but do this to our own. If these kinds of activities continue, there will be nobody left to Protect, and we won t need a military.

No longer will the ducks and geese use this flyway or the screech of the hawks or eagles be heard, for soon this valley with its Beatiful broad vistas and majestic mountains soaring high in the sky, will become a testing ground for the men and machines of war. And soon the cattleman, the miner the rancher will follow those who have abandon this land for both man and beast will go in search of another valley, some where beyond those far purple mountain ranges, a pristine paradise not torn asunder by the sights and sounds of war.

So be on guard people, for your valley that seems so secure and remote now, may well be next on the agenda of the Department of Defence. For we have been, and we have seen, and we now know that a beautiful valley such as ours can be turned into a living hell.

There are those who now lie below the soil of this, Gods beautiful valley, and their spirit will join with those who were driven from their land, by arrogance and despotism, for they shall never be forgotten and will remain a part of the Dixie Valley legacy, forever.

E H Robbins

Box 117,
Gabbs, Nevada, 89409
January 25, 1988

The Honorable Harry Reid,
United States Senate,
Washington, D.C., 20510

Dear Senator Reid,

Thank you for bringing the hearings on **S.1584** to the people of Nevada (Sparks, January 14, 1988) Since the hearing on **S.1584**, I've heard about, but have not obtained, an airspace bill submitted by Congressman Udall of Arizona The bill addresses low overflights of parks and presumably deals with civilian flights over the Grand Canyon However, **S.1584** and Congressman Udall's bill may have areas of mutual interest

These pages constitute the testimony I would like placed on the record for S.**1584**. Prior to outlining my comments on the airspace problem and **S.1584**, I have a few personal comments and questions for your consideration and response (#1 to #4 immediately below)

[1]

In a letter last year, I requested your help in finding a mechanism, via hearings, a possible re-trial, or whatever, to obtain redress in the matter of the unjust revocation of my pilot's license (The Navy falsely accused me of flying within 500 feet of a radar site in Dixie Valley and the FAA suspended my license for 60 days That false accusation directly led to the end of a valuable service for Nevada, the charitable, non-profit, flying doctor service) In my previous letter I detailed the problem at some length

Have you been able to discover which course of action I should pursue? Do you have some capability, as a U.S. Senator, to investigate this totally fabricated FAR violation, or to cause it to be re-investigated?

[2]

Most of the towns and settlements in Nevada served by ***Morning Star Flying Doctor Service*** until the end of 1984, remain without medical service This is not surprizing and is unlikely to change in the future (with a few possible exceptions) because of the isolated nature of the communities we served There are few if any incentives for a physician to go to the settlements we served and there very likely will never be such incentives

There are, in Nevada, other communities and Indian reservations that we could have served if the flying doctor service had been able to expand as planned

A flying doctor medical service is ideal for the remote, isolated communities in Nevada We had planned a non-profit charitable service, flying in to these communities perhaps three times weekly, closely supporting nurse practitioners who resided in the communities

Rural Nevada can be divided into **"rural, rural"** Nevada (Denio, Silver Peak, Owyhee) and **"rural"** Nevada (Fallon, Ely, etc) A flying doctor service would solve **50%** of the "rural health problem" in Nevada and **95%** of the "rural, rural" health problem, in this state

For a period of four years we succeeded in providing regular medical care to isolated rural Nevadans who never before had had such care. (Let me qualify that: one of the towns we served, Austin, in 1864 had 12 resident physicians. But then, of course, it also had about 12,000 inhabitants.)

I can not conceive of other method than a flying doctor service, to provide realistic, cost effective, medical care to these types of populations. The medial care problem is unique, this solution is unusual, but we've shown that it works.

This note is just to remind you that here is a medical care provision problem that has actually been solved. Please keep these thoughts in mind when you deal with the health care professionals in this state. Their minds dwell on larger, urban health care problems and very seldom, if ever, do you find anyone who understands the medical problems of "rural, rural" Nevada, or who realizes that **this problem has been solved and should no longer exist**.

[3] Cruise Route: State Application Identifier #88300045

In November of 1987, the Air Force issued a proposal to establish a **Cruise Missile Route** over Gabbs Valley. This route, which follows an existing IR, passes within a mile or so of the city of Gabbs, it overlies Gabbs Airport, overlies FMC mine, and it presents a small but certain hazard to the populace. I believe it is another example of **poor planning in airspace matters;** once again a rural population is exposed to a threat that a larger population would not be exposed to.

The spare Air Force documentation accompanying this proposal shows no evidence of AF need to establish this route and no evidence that the particular route proposed, aimed at the Gabbs area, is necessary. The final turn that the proposed cruise missile course makes, is into **R4810** south of Fallon. If the missile fails to make the turn to target, it very likely will impact in Fallon.

I am aware that these flights are accompanied by aircraft which can destroy the cruise missile but the facts of the matter are that this particular route is a hazard, the AF has failed to show any need at all and there have been problems with the cruise missile tests in the past which make these practical concerns. There is no need for the Air Force to deliberately place large populations, such as the cities of Gabbs and Fallon, at risk.

Would you be able to generate hearings in Nevada on this new Air Force project? If not, what could you do to help bring some rational, civilian thought into this issue?

[4] NEPA Violations in Major Construction Associated with Expansions of Air Weapons Training Expansion Project in Carson Sink

In 1986 the Navy stated that it would create an environmental impact statement for the many projects now under construction in the Carson Sink. However, after the initial public announcement to that effect, the Navy stopped work on the EIS and simply began constructing targets, power lines, fences, and miles of roads in the region south of Lovelock. When questioned, the Navy in Washington wrote me that they did not intend to do an EIS on the impacts of these projects.

The impacts of expanded air and ground activity in the Carson Sink (which are segments of the overall air and land proposals out of NAS Fallon) have **not** been considered in the existing SOA or land-withdrawal EISs for NAS Fallon.

The impacts of this major federal agency action will be felt in Lovelock, the Stillwater area east of Fallon and on the Stillwater marshes which are a major migratory station on the inland North American migratory waterfowl route.

Under the **FOIA** I obtained the document the which the Navy alleges fulfills its lawful requirement to comply with **NEPA** with regard to this major construction. The document is labelled an environmental assessment. It is one page long and contains significant factual errors.

In response to my questions, Captain Alcorn wrote that he had no idea who created the one page document he had sent me, nor did he have any idea as to how much it cost to create the "EA." In reality, this factually inaccurate page could have been created for 50 cents in less than 10 minutes.

The bottom line is that despite **NEPA** requirements, the Navy is engaged in a major federal agency action, construction worth millions of dollars in the center of one of Nevada's most ecologically sensitive regions, and the Navy claims compliance with **NEPA**, basing it's claim on a one page document of unknown paternity.

Would you be able to look into this matter?

Would hearings on this issue be able to be held in the central Nevada region?

S. 1584

Defining the airspace problem

Overview

The Federal Aviation Agency was generated by the **FA Act of 1958**. By this enactment in 1958, Congress affirmed the **"public right of freedom of transit of the navigable airspace."**

Congress also proclaimed the Nation's need for the **safe and efficient utilization of the navigable airspace,** based upon creation of a functional **'common system'** for both civil and military aviation.

Congress, handed the FAA Administrator a solemn mandate

[a] ensure the safety of aviation and
[b] ensure the safe and efficient use of navigable airspace

Unfortunately for civilian pilots and rural ground dwellers alike, the FAA has failed to comply with the policy expressed by Congress in 1958. In retrospect, it's clear that the airspace mandate Congress gave the FAA was $100 saddle cinched to a $20 horse.

Nothing highlights this failure by the FAA more sharply than recognition of the astounding fact that **more than 50%** of the low altitude airspace over the lower 48 states has been allocated by the FAA for military use. The military responds that while this is true, appearances are deceiving because some of this airspace is joint use with VFR aircraft and so on.

But in actuality, the 50% figure is an **underestimation**. Not included are airspaces such as the STRC, refueling routes, temporary SUA creations and exercises such as Gallant Eagle which create new airspace "countries" for weeks at a time (See Appendix)

The remainder of the airspace, less than 50%, while shrinking everyday, is civilian airspace.

The effects of the military's extensive, often unlawful, acquisition and utilization of airspace, fall upon two main groups:

(i) on ground dwellers and
(ii) on civil aviation

Misuse of airirspace, misallocation of airspace has significant, adverse impacts on the latter group, impacts which are growing increasingly severe. Airspace violations, described further in this text, are impacting fundamental rights of the nation's airspace users. For example, consider the Congressional proclamation, noted above, of a "public right of freedom of transit through the navigable airspace of the United States." **(49 USC 1304)**

The truth is that today **"Freedom of Transit"** lies mortally wounded — gutshot — an innocent bystander at the shootout between military air services at the SUA Corral. "Chester Pilot", hobbling with difficulty through the ever-narrowing corridors of Dodge City, futilely cries out to "Marshall FAA" for help. Darn, but Marshall FAA lies passed out on the floor of the 'Trust Fund Saloon.'

Because the creation of Special Use Airspace (SUA) restricts a citizen's right of freedom of transit through navigable airspace, the designation of SUA is a **critical** aspect of the FAAs supposedly exclusive regulatory authority over airspace.

If you plunge your finger deep into the military's rapidly enlarging SUA pie, you will pull out several factors which, acting synergistically, paint a bleak picture of rural America's descent, through a downpour of FAA irresponsibility, into "Extinction Airfield", in effect making a collective CAT III approach to a noisy, irradiated oblivion.

ACCURATE DEPICTION OF MILITARY USE AIRSPACE ESSENTIAL TO DEFINING PROBLEM

Accurate depiction of the various types of airspace allocated for military use is essential to communicating to others the need for reform. The maps used by your subcommittee at the Sparks hearing significantly underestimated the actual geographical extent of the problem because MTRs were not depicted. MTRs are an important part of today's airspace problem because they are ubiquitous, obtained outside the purview of any public accountability, usurp privately owned airspace over privately owned rural land, and are responsible for the jet aircraft that overfly rural homes at an altitude of less than 100 feet. They represent a hazard for civilian pilots as well.

Accurate depictions of military use airspace did not even exist until recently. Neither the FAA, the Defense Mapping Agency, or the Department of Defense, had ever created a map which showed the actual areas overlain by the two high impact categories of military use airspace, that is SUAs and MTRs.

As you know, the deficiency has been rectified by the two maps I created over the past year. These maps, one of Nevada and one of the contiguous 48 states, were previously provided to your office. These two unique airspace maps were created precisely because there were no airspace maps which accurately depicted low altitude military use airspace.

Because these two maps are the only real world portraits of the military use airspace which is having the greatest adverse impacts on rural America, I would like to suggest that they be used as source material in official discussions of the problem, in governmental documents, and so on.

[1] The attached airspace map of Nevada, previously sent to you, depicts virtually all the military use airspace below 18,000 feet MSL. This includes all SUA, MTRs and the one alert area we have in this state.

This map does **not** depict SOAs, electronically unified aerial ranges and other unofficial types of airspace. It does not show a number of low altitude aerial refueling routes and it does not show the extensive use of high altitude airspace by the military (including Dreamland North, the extremely high altitude range over the heart of Nevada).

This map is a compilation of military use airspace on one chart. It shows data from the FAA **sectionals**, which show SUA (and depict some MTRs as thin lines, i.e. not to scale), the **DMA area planning charts** (which show the various nodes of each MTR) and the DMA **AP/1B** (which provide the altitude and width data on all MTRs).

This map of Nevada's airspace is very accurately plotted. It is current as of 1987. Once again, I believe that this is the **only** accurate representation of the airspace problem in Nevada (military use airspace at low altitude).

After all the source materials were collected, creation of this map required approximately 40 hours of detailed hand plotting.

[2] The second attached map, also previously mailed to you, depicts the low altitude, military use airspace for the entire contiguous United States.

Comparison of Military and Civilian Air Operations

The airspace problem manifests itself in many ways. Just a glance at the map depicting military use airspace below 18,000 feet MSL, is sufficient to make most observers question the huge volumes of airspace currently allocated for military use. As of 1988, the military has managed to convince the FAA to designate more than half of all the low altitude airspace over the lower 48 states, for military use. The military's share of this national resource is expanding every month.

Questioning of top, regional military officers reveals that there is no plan, at the national level, for airspace acquisition and use. Questioning also confirms the fact, made obvious by the unique airspace maps attached, that not only does interservice coordination in airspace acquisition matters not exist, but rather, to the further detriment of the nation, there is what amounts to an airspace acquisition competition, a "get all you can as long as you can" attitude towards airspace, in the military air arms.

The graphs below shed more light on this gloomy state of affairs. Information used to create these graphs was obtained from ***Aviation Week and Space Technology, AOPA*** and directly from the Washington D.C. offices of the Army, Air Force, Navy and Marines.

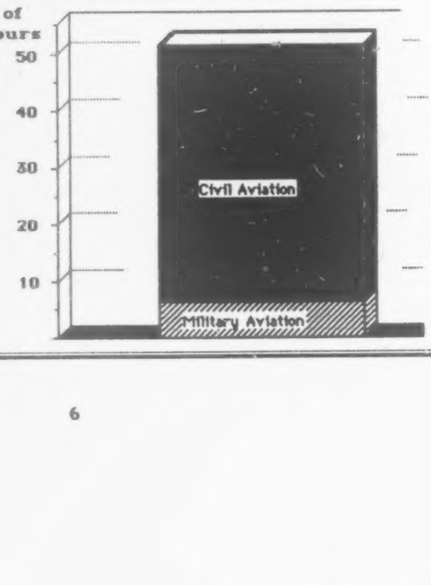
The FAA has designated more than 50% of our airspace for military use. Even though the various military air arms say they don't have an overall airspace plan, nor any specific amount of airspace they require per aircraft, and even though information on these points is difficult to discover, a few reasonable questions need to be asked.

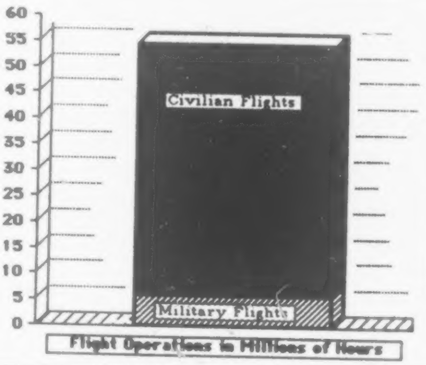
Is there a meaningful correlation between the number of hours the military flies per year and the volume of airspace the military has acquired from the FAA in which to conduct this flying?

Does the military's continuing acquisition of airspace mean that all the airspace now allocated for military use, is still insufficient for existing training requirements? Would national security be threatened if Congress passed legislation requiring the military to show a need for its expanding aerial kingdom? Would the national defense posture be damaged if Congress forced the military air arms to make plans for airspace use and to coordinate their ongoing programs to carve up whatever remains of the nation's airspace? The graph below shows that while military air has acquired more than **50%** of the airspace, military air ops represent only **12%** of the nation's air fleet hours.

Depicted in this graph are **Total flight hours** for 1983, including **all** U.S. civil aircraft and **all** U.S. military aircraft (domestic or deployed overseas, reserves and Coast Guard). The total amounted to just under **52 million hours**.

Total military flight operations (including those at overseas bases) measured in hours, represents **12%** of all U.S. flight operation hours. **Civil aviation generates 88%** of the yearly hours flown by the combined U.S. military and civil air fleets.

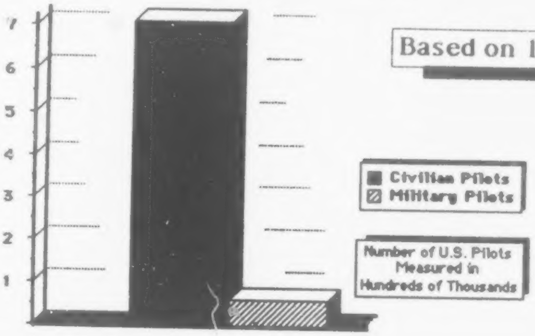




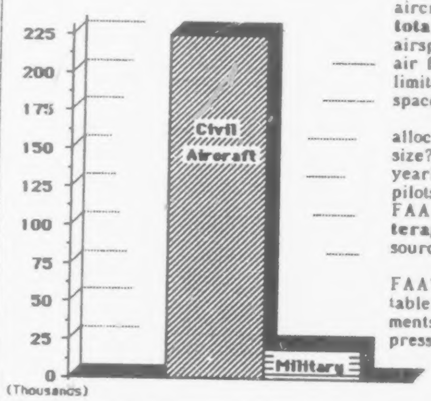
Flight Operations 1986

Despite the fact that the military's flying hours remain at 12-13% of the national totals, and despite the fact that more than half the airspace is already allocated for military use, the military air arms continue their unchecked acquisition of what's left of the rapidly shrinking airspace pie

Based on 1986 Data



Comparative Sizes of Civil and Military Air Fleets



This graph shows the number of aircraft (in thousands) comprising the **total** air fleets of the two groups of U.S. airspace users. The civil and military air fleets 'compete' for the large, yet limited resources of the national airspace.

Is airspace for these two fleets, allocated in rough proportion to their size? or the number of hours flown yearly (above)? or the number of active pilots? The graph supports claims that FAA/DOD airspace allocations are **interagency transfers** of a public resource without public accountability.

Congress hasn't corrected the FAA's failure to create a rational, equitable airspace structure, which implements Congressional airspace goals expressed in the **FA Act** of 1958:

- a common system
- safe and efficient utilization of airspace
- public right of freedom of transit

The map is based on data from the same sources as the map of Nevada. Over a period of about four months, hundreds of MTRs and SUAs were individually hand-plotted onto Defense Mapping Agency templates (**Continued in two pages**)

(**continued**) The military use airspace on this map is very accurately depicted. I believe this map should be **the reference map** when any governmental discussions of problem airspace occurs. There is nothing comparable prepared by any private or governmental agency and in truth, as of 1988, this map is the sole portrayal of the real world situation.

The original map is approximately 4 feet by 8 feet. The 400 hours or so that it took to create this map, revealed about ten possible errors in the charting of military use airspace. These possible errors were forwarded to the Defense Mapping Agency for investigation.

The DMA corroborated approximately 6 errors and stated they would be corrected with the next publication of DMA charts. These comments are made to impress butress my contention that this map is very accurate and correctly represents the airspace problem.

As with the map of Nevada, this map does not show any of the many unofficial airspace problems, aerial refueling routes or the extensive military use of high altitude airspace.

Also, the map does not depict warning areas, which are the equivalent of off shore restricted areas. These warning areas were shown on your map at the hearings but are not very important with regards to impacts on civil aviation and rural residents.

Review of these two maps generally leads most persons to the conclusion that the U.S. has a major problem with the allocation of the national airspace resource. A glance at these maps is sufficient to convince even a skeptic, that military use airspace has been allocated in a haphazard manner, without planning at a national level, resulting in uncoordinated and inefficient airspace utilization.

Historical Perspective on Airspace Woes

The airspace problems of today were predicted and already apparent during the **1958 Engle Act** debates in Congress thirty years ago.

> **There has been an ever-mounting demand by the military services for airspace...**
>
> **These Government needs have led to the designation of a large amount of airspace as 'special-purpose airspace'...**
>
> [Senate Report 1181, 1958]

Military airspace acquisitions are effected via SUA designation, were mirrored by the massive public domain lands withdrawals in the two decades prior to 1958. The common thread in both cases is that allocation of a national resource has become so uncontrolled that Congressional action was/is mandatory.

In 1957, in words directly applicable to the airspace problems today, Congressman Engle stated [Congressional Record, 5512, 1957]:

> **...The background of this legislation is that in 1937 the military agencies of the United States controlled approximately 3 million acres of land. At the present time the Department of Defense controls over 30 million acres of land in the continental United States and Alaska...**

> ... the practice grew up, and as it grew up these various defense agencies, the Army, the Navy, and the Air Force, would simply make out a slip of paper in the nature of an application to the Interior Department asking for an area perhaps 100 miles long and 50 miles wide in the State of Nevada, and send it over to the Secretary of the Interior saying it was absolutely necessary to their operations, and that area was set aside for those military operations and put into what could be regarded as a legal icebox...
>
> What this bill does, in effect, is to repeal the implied grant of power under which the Department of Defense for a great many years has undertaken to slice out without any restraint or restriction whatever — and really on their own say-so because nobody in these other agencies ever argues or disputes a matter of military necessity — and restore that power to the Congress where it belongs and where it is vested by the Constitution of the United States.

Congressman Engle also noted:

> ...it is clear to this committee, then, that military use requirements today must be thought of in terms of both horizontal and vertical needs. While the concern and jurisdiction of this committee is limited to the former...
>
> ...the committee believes that it is absolutely vital that continuing reevaluations be made of Federal legislation and administrative controls governing the assignment and use of airspace...
>
> ...where we spoke of 'military acres' pre-World War II, and 'military square miles' by 1945, today those requirements can only be adequately described in terms of 'cubic miles'...

In retrospect, its accurate to say that for the past three decades, the "administrative controls governing the assignment and use of airspace" did not receive the attention that members of Congress thought "absolutely vital ". Just as public land for military use was once dispensed by the DOI, without public accountability, we now are witnessing a relatively uncontrolled and often illegal distribution of the nation's airspace to the military, by the FAA.

Pertinent to today's problem of abusive SUA designation, is a statement made by Senator Bible in 1957, commenting on a precursor bill to the **Engle Act**:

> ... the military use of public lands has been flagrantly abused and the measure now before us provides a means of assuring that, in the future, a clear showing of actual need must be made to the Congress...

Passage of the **Engle Act** in 1958, halted the uncontrolled transfer of public domain lands between the Department of Interior and the DOD. I believe that the roots of the airspace problem are intertwined deeply within how government functions, and that without the passage of an equivalent to the **Engle Act**, airspace legislation will be ineffectual.

SPECIFIC PROBLEMS WITH AIRSPACE ALLOCATION AND USE

[A] Agency Review of SUA and MTR Use is not Meaningful

(1) Annual utilization reviews (URs) for all **restricted areas** are mandated by the FAA regulations expressed in FAA Handbook **7400.2C**. The idea is that the FAA could take under-utilized restricted areas off the charts.

The facts of the matter are that URs often consist of virtually identical copies from year to year, with little information as to the actual hours of usage. For some areas, my requests for the UR's have been met with "not available" or other excuses. Basically the military and the FAA do not take this seriously.

This aspect of the problem is aggravated by the military's unlawful, but real, **proprietary attitude to civilian airspace**. Intimidation of civilian pilots created by engaging in hazardous activities in MOAs, keeps wise civilian pilots out of airspace they should have free use of. Military personnel (flying officers) tend to be misinformed about airspace. For instance, many military officers I've talked with are unaware that MOAs are a relatively new form of airspace, created in about 1974. Some are unfamiliar with what the rules of use for MOAs actually are. It is not uncommon to find military officers who truly believe MOA's are a military preserve.

> **The NAS Fallon air warfare training complex Military Operating Area (MOA) airspace is reserved by the Federal Aviation Administration (FAA) exclusively for military air operations.**
>
> [Erroneous but Official Navy comments to the DOI, 1983, (N-37731)]

Unfortunately, these unlawful practices have gone unchecked by both the military and the FAA and while the civil aviation community withdraws for self-protection, the rural Americans living below these areas can't withdraw and are impacted by whatever the military decides to do in "their airspace."

(2) MOA Utilization Reviews

The Rules and Regulations for Handling all types of problem airspace (SUA and MTRs) are found in two FAA manuals:

(i) Handbook 7400.2C
(ii) Handbook 7940.1G

According to FAA Handbook **7400.2C,** entitled **Procedures for Handling Airspace Matters, MOA utilizations** are the subject of joint military/FAA conferences to be held on a fairly frequent basis. I have not as yet been able to obtain the results of such conferences. Currently under appeal is a **FOIA** request, for such information.

(3) MTR Utilization Reviews

FAA procedures describing how **Military Training Routes** are to be established, are detailed in FAA Handbook **7610.4G**, entitled **Special Military Operations**.

MTR utilizations are recorded simply by the number of flights per month. I've obtained some of these and other than the bare number (i.e. 10) of flights, no information on their use is apparently collected. A significant number of routes do not have the information available. I suspect few people have ever asked for it.

In addition, I have not yet been able to obtain utilization figures for the species of MTR called slow routes or **SRs**.

To the best of my knowledge, the information collected on utilization of SUA and MTRs has never resulted in the revocation of such airspace once it has been allocated for military use.

(4) There is an administrative review mechanism that theoretically should generate a reivew of problem airspace upon petition of the public. This is formal petition procedure is described in

Title 14, Chapter 1, Subchapter B, Part II,
Subpart B, #11.75
(Also described in FAR Part 11.75)

This provision allows one person or a group of persons to file a petition (in triplicate) for the review, revocation and/or alteration of any SUA, for various reasons.

I filed such a petition on March 28, 1985, for the review of and revocation of, certain SUA in the Fallon area. One of the primary reasons for the petition was that these airspaces do not comply with the FAA regulations pertaining to SUA that is based at the surface of the earth.

Nearly **three years** have now passed since I filed my petition. I've written the FAA every 6-12 months to determine the status of this petition. Their response is that they don't know. My petitions are legitimate, they are filed lawfully and in accordance with a regulation that is designed precisely for these reasons.

Judging by the FAA's dilatory response, I suspect this petition for review has rarely been. After three years it's unlikely the FAA, unless forced, will provide a legitimate response to Title 14 . . . petitions. However, if the FAA adhered to its mandate from Congress, expressed in the **FA Act** of 1958, to ensure a common, safe system of aviation for military and civil aviation, and to protect persons and property on the surface, then this Title 14 mechanism would be of some assistance to the afflicted public.

Would it be possible for you to inquire as to why the review of my petitions has been delayed and how much longer the FAAs review will take?

[B] The Existence of Unlawful SUA

This concern is a major aspect of the airspace problem which Congress or potential corrective legislation must address. Let me provide a number of examples of this widespread problem, taken from the area where I live.

(i) R4803 is a small restricted area which lies between Fallon and Reno. This restricted area is bombing range which the FAA, in 1984, declared a hazard to civil aviation and military aviation. The restricted area is based at the surface of the earth.

Within the restricted area/ bombing range are many privately owned dwellings, private citizens with personal homes and property. The FAA regulations are very clear that when any SUA goes to the surface, the military agency that desires this area **must** own, lease or by agreement otherwise control the underlying surface. This hazardous restricted airspace does **not** comply with this most fundamental FAA regulation.

Furthermore, the FAA conducted a SUA review of central Nevada SUA in September 1984. They concluded that **R4803** was a hazardous airspace and that the Navy should expedite its closure. During these years the noise and the hazard have caused the residents to sign petitions to the Navy, asking for relief, to no avail. Since that FAA recommendation was published, the Navy increased its operations, turning this area into a Laser Range, which increased the hazard to the citizens already unlawfully enclosed within a bombing range declared a hazard by the FAA.

R4803 illustrates a fact of life which will render the provisions in **S.1584** ineffective. The military air services now emphasize that they go to great lengths to comply with NEPA. The FAA likewise states that complying with NEPA is one of it's greatest delights. Regulation **#7005** in Handbook **7400.2C** mandates compliance with NEPA. **S.1584** attempts to make the FAA responsible for NEPA compliance in airspace matters and then would have the FAA rectify situations wherein the military air arms did not comply with NEPA.

Yet, as in the case of **R4803**, the FAA's **own recommendation** that this restricted area be closed, is ignored by the Navy. Captain Alcorn wrote me in December 1987 that the Navy had no intention of closing **R4803**. The illegalities, the hazards to civil aviation and the hazards to citizens unlawfully enclosed in the bombing range remain. The FAA, which is the **only** federal agency which has the power and authority to allocate and revoke airspace, does nothing to bring the Navy into compliance with its recommendations based upon risks to life.

How will S. 1584 alter this type of bureaucratic willingness to flaunt the laws and airspace handling regulations?

The ghost town of Fairview has been bombed by the Navy at least two times in the recent past, the last bombing in June, 1985. Fortunately, although private property was destroyed, no lives have as yet been lost.

The Navy's recurrent bombing of this tourist attraction on Highway 50 occurs because **R4804,** the restricted airspace which overlies Fairview, is an illegal airspace. The bombing range goes to the surface of the earth but similar to R4803 and contrary to FAA regulations, the Navy does not control the underlying surface. Therefore there are private lands and structures inside the bombing range. When the military pilot flying inside restricted airspace bombs a target, he mistakenly considers underlying structures to be part of the target complex, and the ghost town is bombed. **When** this mistake happens in **R4803**, people are going to die.

Is there anything you can do to enforce the law in this region and to effect Navy compliance with the FAA recommendations?

(ii) The only VFR flight path through central Nevada, is the incredibly small corridor paralleling Highway 50, at the point where Frenchman's Station used to be located.

If a VFR civilian aircraft transits this corridor in it's southern third (it's only a mile wide), the civilian pilot actually exits into an extremely busy, hazardous, restricted area (**R4804**).

This is amazing, yet the FAA will not alter the corridor in any meaningful fashion. If such a situation existed near the Los Angeles TCA, rapid action would ensue. I believe part of this problem, other than the careless planning of airspace, is a function of how many people live in the region, not on the legality of the actions or the airspace structure.

(iii) Restricted area **R4813** over the Carson Sink, is also unlawfully based at the surface of the earth. As noted above, the FAA regulations state that the Navy must own, lease, . . . the underlying surface. This is clearly not the case here.

Much of the land underlying **R4813** is controlled by agencies with which the Navy has no such agreement. Other land is private and the Navy has no agreement. Despite the failure of the Navy to comply with existing regulations regarding the base of a restricted airspace, the requested airspace was given by the FAA to the Navy.

The FAA, at one point, claimed that these illegal restricted areas were 'grandfathered.' Unfortunately for that theory, the airspace handling regulation mandating surface control prior to placing the base of a SUA at the surface of the earth, predates the establishment of some of the restricted areas.

Consider **R4813** for example. Through the **FOIA**, I obtained a FAA letter written prior to the allocation of the airspace for **R4813**. This letter states that the Navy has assured the FAA that it controlled the underlying surface.

The fact is that this airspace (and others) were created contrary to existing regulations, by deception, without oversight or public accountability. **R4813** is an unlawful airspace.

Not only the airspace in this region was illegally acquired. Two years ago it was discovered that the **public land** being bombed by the Navy in **R4813**, was not controlled by the Navy and had never even been withdrawn from public use, despite more than a decade of requests from the BLM to the Navy to "legitimize" its unauthorized destruction of public domain lands.

If these illegal airspaces are not legitimized, even at the direct request of the FAA, I don't believe that the provisions in **S.1584** contain action forcing items that will remedy the problem.

(iv) This problem of illegal SUA is highlighted by the Navy's recent attempt to alter the airspace structure in central Nevada, to the detriment of civil aviation and rural residents in the region.

The Navy's proposal to alter these SUAs, accidentally came to my attention in the spring of 1987. I wrote to various legislators and asked them, in the matter of the proposed expansion of **R4813**, to ensure that the Navy controlled the underlying surface, as required by existing FAA regulations.

When I followed up on the Navy's proposed SUA alterations, the FAA stated that the Navy had **withdrawn** its proposals. The Navy told me that this was because they had not obtained control over the surface and were unwilling to proceed in the public eye.

The central point here is that the regulations that exist, if complied with, would significantly ameliorate the existing situation. But regulatory compliance in airspace matters in rural areas appears to be a function of public attention and demographics, rather than respect for, and compliance with, the law.

[C] Regulatory Evasion vis Creation of Unofficial Airspaces

S.1584 will not prevent expansion of existing unofficial airspaces nor prevent the creation of new ones. Due to its pervasiveness and pernicious impacts, this problem should be a priority reform target.

By unofficial airspaces, I refer to those airspaces which have a significant adverse impact on civil aviation and/or ground dwellers, unlawful airspaces which the FAA refuses to recognize or chart, but airspaces which are none-the-less very real. There are four main species of unofficial airspace: SOAs, COR equivalents, the STRC, and Confluent MTRs.

SOAs

The FAA denies the existence of Supersonic Operations Areas (SOAs) and will **not** chart them on aviation maps. Yet SOAs are so hazardous to VFR flight that in reality they represent ***de facto*** restricted airspace.

A SOA is a MOA (along with ATCAA) in which the military conducts low altitude supersonic aircombat maneuvers (ACM). Closure rates between military and civilian aircraft can easily exceed **1000 knots**. Airspace and Procedures branch of the FAA in Washington, told me that low altitude supersonic ACM is a result of DOD using their waiver of **FAR 91.70** (renewed by the FAA) and extending it beyond the 540 knots which the FAA maintains was 'understood to be the upper limit'.

Regardless of how it came about, the FAA quietly acknowledges that supersonic ACM below positive controlled airspace **shatters the safety principle of "see-and-avoid" aviation**.

> **Pending the results of a study by an independent scientific agency to determine the feasibility of a supersonic flight in a "see and be seen" environment, we believe it undesirable for the USN to conduct supersonic flight below positive controlled airspace within MOA's. Therefore, we object to the supersonic operations area as now proposed for North Central Nevada...**
>
> [FAA comment on Navy supersonic proposal, Nevada, 1985]

Despite this official FAA opposition (FAA comments on a Navy EIS for a SOA), four months later the Navy commenced supersonic ACM in the Gabbs and Austin MOAs. In response to the Navy's rebuff, the FAA (with apologies to P. G. Wodehouse) 'coughed, one soft, low gentle cough, like a sheep with a blade of grass stuck in its throat.' and then forgot about it.

While the military air arms are engaged in an aerial form of condo-conversion, changing MOAs into SOAs — a regulatory end run — prudent civil VFR pilots stay clear. Unfortunately, not all VFR pilots are aware of SOAs and in many locales, such as Nevada, a VFR pilot has no alternative to logging time in SOAs because they are so widespread. IFR flight is legal in certain regions of SOAs. Unfortunately, the impacts of intense sonic booms on ground dwellers and structures, remains an unaddressed problem.

The hazards of SOAs are clear to everyone who becomes familiar with their properties.

> **Frankly, it was rather surprising to find that none of these activities, including their being conducted at supersonic speeds, is not considered hazardous activity by the FAA.**
>
> [Report by U.S.Magistrate, CV-R-85-540-ECR, 1986]

> **The Aircraft Owners and Pilots Association have expressed their concern that the see-and-avoid concept of collision prevention cannot be depended upon for aircraft operating at supersonic airspeeds. Their concern is that a high collision potential would exist between the USAF aircraft flying at supersonic speeds and non-participating Visual Flight Rules (VFR) civilian aircraft operating below positive control airspace within the Gandy MOA.**
>
> **However, existing military operations in the Gandy airspace already involve speeds approaching the speed of sound and a see-and-avoid concept should not be depended upon even in these instances.**
>
> [emph.added. Gandy MOA DEIS, U.S.A.F., p.54, 1983]

The fundamental principle of safe VFR flight through see-and-avoid, is dead. Consider a real world example in Nevada.

Imagine a F-14 and your T-210 in Proctalgia MOA, ten miles apart and closing on a collision course. Both aircraft are in straight and level flight. The closure rate is 800 knots. Both you and the Navy pilot are actively searching for other aircraft. Both of your lives depend on the principle of ensuring safe VFR flight through "seeing-and-avoiding".

Scientific studies document that those who depend on "see-and-avoid" for collision avoidance are under the spell of a lethal illusion. Lincoln Labs in Lexington, Massachusetts, does TCAS studies for the FAA. Based on reports [#DOT/FAA/PM- 84/17 (November 1984), 42PM-TCAS-0040], studies and personal conversations with a spokesman at Lincoln Labs, the following realistic assessment of this flight in a SOA can be made:

The probability that either of you will see the other aircraft in time to take evasive action and avoid a mid-air, is less than 0.1.

Added to that low probability of survival, is the fact that the military aircraft are camouflaged. Not long ago, I called Lincoln Labs and posed the question:

"What if the military aircraft is camouflaged? How much lower will the probability of visual acquisition be?"

The surprising response was:

At those closure rates the probability of collision avoidance by 'see- and- avoid' is already virtually zero.

Your risk of collision is not increased even if the jet is invisible. You might as well turn on your autopilot and get some sleep.

A VFR pilot doesn't have to be a genius to realize that something is wrong in the world of flying when "see-and-avoid" and "sleep-and-avoid" are equally effective in preventing mid-air collisions. It's clear that in allowing "see-and-avoid" VFR flight in SOAs, the FAA is probing the outer limits of our gullibility envelope.

SOAs have noisily crept across thousands of square miles of the western United States: Sells MOA, Gladden MOA, Valentine MOA, Morenci MOA, Desert MOA, Gabbs North MOA, Gabbs South MOA, Austin One MOA, Gandy MOA, to name a few.

An area of nearly 45,000 square miles is slated for SOA conversion by Canadian Armed Forces in Labrador. Over ocean supersonic training has been accepted, in Warning Areas, for some time.

The 'success' of the unofficial SOA program depends a great deal on the DOD's judgment that VFR pilots' are perceptive and will, in the interests of survival, stay clear of the MOA/SOA.

As a result of a perception that the SOA, or airspace underlying it, is less safe due to a greater number of military flights and increased speeds, civilian pilots may avoid the airspace underlying the SOA, or choose an alternate route around it, reducing accessibility to this airspace for civil aviation.

[Official Navy comments in DEIS for Nevada, 1985, p.5-75]

Supersonic military activities in the MOA (SOA), by creating constraints on airspace accessibility would also imply increased inflight risks for those civilian pilots who chose to traverse MOA or SOA airspace under VFR conditions.

[Navy comments, 1985 DEIS, p.5-51]

All this verbal pussyfooting notwithstanding, SOAs represent the **ultimate hazard** to the safety of VFR flight. Let me re-emphasize: the FAA is **not** going to tell you about this.

> **SOA's will not appear on any air chart or other official publication.**
>
> [FAA/Navy statement, CV-R-85-540-ECR, 1985]

However, the FAA is not above dropping a few subtle hints, part of the FAA attempt ***to express policy without really committing itself.***

For instance, if you are a pilot, you will note on your sectional, near the boundaries of most MOAs, the chart carries a small notation such as:

Radar Service may be provided by contacting . . .

or

For Advisory Service Transiting the MOA contact . . .

Now, look at a sectional near a known, but unmarked, SOA. The notice for Desert MOA (SOA) in which supersonic low altitude ACM is common, **orders:**

> **CONTACT NELLIS CONTROL ON 124.45 OR NEAREST FSS PRIOR TO ENTERING MOA**

What the FAA is telling the civilian pilot (without acknowledging the existence of hazardous SOAs) is that there are 'Moa's' and there are 'MOA's'. SOAs can't be shared with VFR pilots. They are ***de facto*** restricted airspace which is in reality, airspace removed from public right of freedom of transit, via unlawful procedures.

An analogy of today's unsatisfactory situation is pictured by E. B. White's conversation between mother (FAA), child (VFR pilot) and vegetable (SOA).

MOTHER: **It's broccoli dear.**
CHILD: **I say it's spinach, and I say the hell with it.**

How will **S.1584** remedy this nearly ludicrous situation? The government agencies involve claim that **NEPA** has been complied with and the FAA, which opposed the SOA in central Nevada, has said nothing in the face of Navy implementation of the opposed plan.

To be effective, a legislative remedy from Congress must first mandate a **review of all SUA**, including the officially unmentioned SOAs and then **take action** to legalize whatever it feels necessary.

Second, only if Congress regains the direct power to allocate airspace requested by the military (at volumes greater than 1000 cubic miles, for example) will this problem be brought under control. This latter point is the **Engle Act of the Air** concept.

As it stands, **S.1584** does not represent an effective solution to our airspace problems, nor does it prevent the problems from becoming more severe in the future.

STRC

The Strategic Air Command (SAC) is presently creating another variety of **unofficial, hazardous, low altitude airspace** above 300,000 square miles of seven western States.

The "Strategic Training Range Complex" (STRC) theoretically is a low altitude network of SAC training routes. At first glance, it appears that SAC has simply combined existing low altitude training routes with newly created routes and called it the STRC.

However, the STRC low altitude training activity will be 'controlled' by computers generating **randomized route ingress and egress points** for the bombers. Thus, STRC routes will be exited or entered, randomly. To civilian pilots and rural residents whose private airspace has been unlawfully taken, the STRC represents an uncharted low altitude 300,000 square mile MOA.

COR EQUIVALENTS

In the early '70s the military attempted to create **a continental operations range** (COR) which was, as its name implies, a huge airspace complex covering virtually all of the lower 48 states. This plan failed, apparently due to the unacceptable expense and the need for a few technological capabilities which did not exist then (but do now).

The military's next version of the COR program proposed creation of an electronic warfare range that covered the area between Denver and the west coast. Again, financial constraints prevented implementation of the plan.

Finally, in 1974 the Air Force published a Draft EIS proposing a poor man's COR, the **electronic fusion** of the three large existing airwarfare training complexes (Nellis, Fallon and Hill ranges). This COR would enfold most of the intervening airspace.

Although the last proposal was not **officially** followed up , it was none-the-less implemented, without public notification, public comment, or environmental review.

The military denies the existence of a **COR**, but has remained speechless on the matter of the progressive unification of these ranges as proposed in 1974. There is a wide range of corroborating evidence that COR exists and that the impacts from this unofficial prototype are becoming widespread.

Today's 'Red Flag' exercise is the budget version of the cutback COR training scenario that once included all the airspace between Denver, Reno and Las Vegas. As mentioned above, upon questioning in 1984, the DOD officially stated that COR was "no longer a viable concept". The same year however, Michael Skinner, in his book entitled ***Red Flag***, quoted the DO of the Nellis range group:

> **Continental Operations Range was the first attempt to do that (build a huge unified electronic warfare and bombing range), but it was a little bit overambitious. We couldn't afford all the airspace, all the money. It was too big a bite all at once. But eventually, I think we're going to get there.**

I believe that this real, officially denied, multi-State aircombat training airspace, likely represents the first step of an **even larger scale of unofficial military airspace integration**. With the capability provided by GPS Navstar to score aircombat training maneuvers in any airspace, the process leading to a true continental airspace devoted to airwarfare training is historically predictable, technologically feasible and militarily irresistible.

The rural residents of America and the civilian pilots can only guess at how the creation of COR equivalents will impact civil aviation and rural life in general.

S.1584 does **not** address this species of unofficial airspace and is not capable of dealing with (without amendment) the electronic unification of aerial ranges across the entire nation, a project which is likely to occur during the next decade.

CONFLUENT MTRs

Over the past decade, Military Training Routes (MTR's) evolved from relatively straightforward oil burner routes, into 'skinny MOAs' with LOWAT.

LOWAT is **Low Altitude Air to Air Training**. This occurs on specifically designated MTRs. Rather than representing a significant departure from the original concept of MTRs, by creating this acronym, the FAA is verbalizing the actual practice.

MTRs can be fitted with a number of options. MTRs may have maneuver areas and re-entry tracks. Into this category fall photo reconnaissance routes, with a lateral route width of 16nm and road reconnaissance routes, requiring a lateral route width of 10nm to 30 nm.

The thin MTR line zigging across a sectional chart is less an indicator of MTR reality than an admission of the limitations of cartography. The profusion of MTRs is so great in some regions that MTR confluence creates what in reality is a hazardous, low level airspace which is, like the previously mentioned airspaces, unofficial and hazardous to civilian pilots and rural Americans in general. (graphic)

Both VFR pilots and rural residents are coming to a common realization that the MTR route designation process is out of control, primarily because of a lack of public input. The FAA has the authority, without public input, to designate IRs; the military can designate VRs, even in the face of FAA opposition.

S.1584 as it stands, will not significantly affect the existing MTR problem nor rationally modify the continuing, haphazard allocation of airspace for MTRs across the nation. These seldom considered airspaces represent a significant percentage of the problem airspace in this nation.

S.1584 should be amended to mandate a review of existing IRs, VRs and SRs. **S.1584** should have a provision making it impossible for the military and the FAA to allocate airspace which is non-navigable and is in fact, airspace in private ownership to about 500 feet above rural private property.

[D] New activities in existing restricted areas and MOAs

The airspace problem is compounded by activities such that were not dreamed of by the FAA a decade ago. The agency's patchwork approach to new and potentially hazardous uses of existing airspaces, has been very ineffective in addressing the known and postulated impacts on residents living (unlawfully and unwillingly) inside bombing ranges, residents who are exposed to intense electromagnetic radiation, laser type radiation and sonic booms.

The only reason such activities are allowed in a genuinely uncontrolled fashion over rural residents, is the negligible political power of these sparsely inhabited regions.

Lasers for target designation and other uses, are a particularly hazardous form of electromagnetic radiation which is used in SUA within which people have their homes and families. The military says its protocols prevent hazardous use but the situation has the potential for great harm.

Likewise, aircraft like the EF-111, overfly rural homes while generating enough electromagnetic radiation to disrupt TV's, phone systems and very likely, Sertoli cells. There is at present no method for the public to ensure its safety, to ameliorate a potential public health problem.

[E] Military FAR violations ignored by FAA

Frequent violations of the FARs, which apply to military and civilian pilots, when reported to the FAA, are virtually ignored. A **significant percentage of such violations**, such as a jet flying over your house at an altitude of 50 feet, **occur on military training routes**.

The FAA is the only agency which regulates the national airspace system but refuses to enforce compliance with its own safety recommendations in rural areas (as in **R4803** above). The military, in time of peace, is required to obey all **Federal Aviation Regulations** for which it does not have a waiver. The FAA has a mandate to create a **common system**, by which civil and military aviation are regulated.

A large percentage of military airspace offences occur within the Military Training Routes (there are three main types of MTRs). This is because the routes, lacing the U.S. like a web spun by a drugged spider, can be created without public knowledge, can be changed every 56 days or so, are exempt from meaningful utilization review, are ignored by the FAA as far as military FAR violations on these routes are concerned, and as in Nevada, where the routes are so ubiquitous, multitudes of adjacent MTRs, in effect create a low altitude MOA with its base at the surface of the earth.

To illustrate why MTRs must be included on serious airspace maps and in serious airspace discussions, consider the viewpoint of the civil pilot. Mr. Fulkerson, in testimony before your subcommittee in Sparks on January 14, 1988, provided facts on how many MTRs, MOAs, SOAs, RAs and other airspace varieties are transited during an intra-state flight in a light civil aircraft from Fallon to Lincoln County Airport (upto 4 MOAs and 40 MTRs).

I've flown this route and it's not untypical. Let me review a average flight through the chaotic airspace environment generated by the lack of controls over airspace allocation and by the lack of regulatory enforcement over hazardous military activity that should be conducted in restricted airspace and not in MOAs or MTRs.

Both by regulation and inclination, I take responsibility for the safety of my VFR flight. Despite this, under existing airspace conditions, a flight to Lincoln County Airport as described by Mr. Fulkerson, or to nearly any destination in the western United States, is a hazardous undertaking, with safety more dependent upon luck than alertness.

Safe VFR flight theoretically can be ensured by following the advice of the FAA and the court system. The courts have stated that

> **...it amounts to reckless operation when a pilot lacks vigilance in observing other air traffic or in passing too closely.**

In the flight used as an example above, the FAA further reminds me to

> **exercise extreme caution in the vicinity of Fallon Municipal Airport**

due to military aircraft in the area. This is supposedly safe airspace, civilian airspace, but even here, mere 'vigilance' is not sufficient to ensure my safety. I must exercise 'extreme caution'.

The first MOA along the flight path is the Ranch MOA just south of Fallon. The FAA advises that I and my family, who believe the FAA has created a safe, efficient airspace system, are now exposed to an **"extreme risk of mid-air collision."**

The warning is timely of course, but is it any wonder that civil aviators who avoid MOAs, rightly consider many MOAs as military airspace obtained by intimidation. By comparison, Chapter 4 of the Airman's Information Manual (AIM) sounds relatively benign:

> **Pilots operating under VFR should exercise extreme caution while flying within a MOA when military activity is being conducted.**

Most living civilian pilots recognize that the phrase "**when military activity is being conducted**" must be translated into Reality. It really means "**your survival depends on understanding that nobody, including the military, knows when military activity is actually being conducted in a MOA.**"

Continuing the flight to Lincoln County Airport in southern Nevada, we bank gently to the southeast and penetrate the Gabbs South MOA and Fallon SOA (supersonic operations area). As explained in more detail elsewhere in this testimony, the FAA **denies** the existence of SOAs and refuses to mark SOAs on aviation charts. Consequently, the rules of flight do not specify the level of consciousness requisite to their safe transit. Through experimentation with several levels of 'wariness', I conclude that 'gross alertness' will have to do until the FAA rises from its coma.

Between my present position and Lincoln County Airport one hour ahead, lie approximately 15 MTRs — a crazy quilt pattern of hazardous airspace etched upon the aerial face of Nevada.

Both from a civil aviator's point of view and that of a ground dweller who suffers the effects when some unknown bureaucrat places a high speed jet highway down to the surface of his rural yard, MTRs represent a major, unaddressed and greatly under-estimated problem.

The ***Airman's Information Manual*** (AIM) warns (Chapter 3) that 'vigilance' alone, is not appropriate to flight in MTRs. Civilian aircraft

> **are not prohibited from flying within a MTR; however, extreme vigilance should be exercised when conducting flight through or near these routes.**

Review this statement while looking at the military use airspace map of Nevada enclosed with this testimony. There are very few places in Nevada (a situation duplicated in many other states) that are not on, or near, a MTR. The implications of an unsafe airspace are recognized by most civilian pilots.

Further consider the FAAs constant importunations to exercise extreme levels of vigilance. As a physician, I understand the meaning of the phrase '**exercise extreme vigilance and extreme caution.**' If a diaperless male infant with a full bladder requires examination, I exercise extreme caution. When using a tongue blade to examine the pharynx of a six year old girl with an upset stomach, I exercise extreme caution. Regional FAA representatives responding to questioning at public hearings have turned the "exercise of extreme caution" into an art form.

But if normal VFR flight by civilian pilots requires the continuous exercise of extreme vigilance and caution, surely something's wrong with the way the FAA has implemented its Congressional mandate to create a safe, efficient, common airspace system for use by military and civil aviation.

Has the FAA Administrator ever determined how much "extreme vigilance" and "extreme caution" the average VFR pilot possesses? If he doesn't know, I can tell him: it's less than the amount necessary to transit Nevada and remain in compliance with the VFR flight regulations.

The average VFR pilot is capable of approximately 15 minutes of 'extreme vigilance', with a 15 minute reserve of 'extreme caution' (somewhat less, if your aircraft is 'practice intercepted' by a couple of F-18's). The safety of the rest of your VFR flight depends on a variety of altered states of consciousness, none of which are mentioned in **AIM**.

MTRs are even more hazardous to the health of rural America than most MOAs. **S. 1584** as it stands now, will **not** affect the existing MTR structure nor the rapidly expanding MTR structure, leaving a major problem untouched.

Sources of Airspace Problems

Selected Fundamentals

For many years, the military has papered over the increasingly severe impacts of military airspace use, with various euphemisms. Even this technique has now become ineffective.

The ***Sound of Freedom*** (a euphemism which attempted to drown out the outcry generated by military violations of rural Americans' constitutional rights) is now being swamped by the ***Noise of Democracy*** (my euphemism for the public outcry now being heard; the hearings on **S. 1584** constitute a part).

The basic causes of the airspace problems impacting rural America today, can be divided into several broad categories:

DEMOGRAPHICS

Residents of sparsely populated regions of the U.S. have become the lastest minority to suffer the effects of federal government's less than benign attention. The items that follow all evolve from the tendency to believe that by doing to a few persons that which cannot be done to many, the government is somehow being considerate. It is precisely this type of consideration which the Constitution was written to protect us against.

Changing Technology

The adverse impacts of new military technologies are shunted into airspaces over sparsely inhabited regions. These impacts of new technologies are really the specific manifestations of a chronic human problem, the clash between new technologies and existing society — application of new technologies, new capabilities (for example, supersonic aircraft, impending supersonic cruise fighters, the hypersonic transport, TACTS, Navstar GPS).

This problem can be attenuated, but not resolved, by a generalized approach to the protection of people and property. Military aviation tactics will continue to change; the country is now developing a sonic-boom generating hypersonic transport which is more than just a quasi-military program. The impacts from this type of development will continue to arise in the future.

Remedying the flawed mechanisms of airspace allocation and putting teeth into the airspace review system, will certainly help. The problem, as mentioned before, needs more than just a quick fix.

Government Tends to Compromise the Rights of Minorities

These airspace concerns are also a contemporary manifestation of the perennial tendency of government to compromise the rights of individuals and minorities while pursuing the good of the majority. The clearest manifestation of this is in the military's avowed purpose to conduct hazardous, destructive low altitude supersonic training over sparsely inhabited regions, because the impacts over more populated areas would not be acceptable.

This faulty reasoning would be as easily recognizable by James Madison, as it is by the contemporary afflicted rural American.

GENERIC SOURCES OF AIRSPACE WOES

[A] Poor planning

The military's need for increasing amounts of newly designated SUA is to a large extent, driven by the three factors of **inefficient utilization** of existing SUA, **interservice rivalries** that tend to maximize these inefficiencies, and the **poor or non-existent airspace planning**.

Several decades ago, poor, haphazard planning by the bureaucratic bound, peacetime military, was well known to legislators. Consider the words of Nevada Congressman Cliff Young, in 1957 (reported in House Report *2856):

> **Gentlemen, I am definitely not opposed to the Navy's proposal regarding the Nevada withdrawal. It is simply that I do not know what the proposal is. My constituents share this feeling of confusion.**

Let me provide a more recent example from Nevada. As you know, the Oregon Air National Guard recently obtained Hart MOA from the FAA despite overwhelming opposition from the general and flying public. Why was this airspace actually requested?

Since 1961, Oregon has been afflicted with MOA creep and seen the designation of the Goose MOA, Saddle MOAs, Warning Area 93, the Hart MOA and a proposal to drop the base of Juniper MOA to 400'AGL.

In 1985 the Oregon Air National Guard requested even more SUA, proposing the Hart MOA over southern Oregon and northern Nevada, shoe-horning it deftly between existing MOAs. The OANG Major who briefed the public stated that after his unit moved to Klamath Falls, they discovered that existing MOAs were not sufficient to provide for their training needs. Thus the Hart MOA was required. A member of the audience asked the Major:

> **When the your unit chose to base in Klamath Falls, was the lack of suitable, existing airspace for training not taken into account?**
>
> **Was the amount of existing airspace available not mentioned in the beddown statement?**

The Major's response was (after the meaning of a beddown statement was explained to him) that the airspace available for conducting the training of a unit based in Klamath Falls had not been considered, either in any documents nor in planning sessions. The lack of planning has been refined to a science by the air services.

Thus, the unit was bedded down at Klamath Falls, and presumably due to the rubber stamp nature of obtaining airspace from the FAA, the desired SUA, including the Hart MOA, was obtained (ironically, 'as planned' by not planning). Warning areas were established and existing MOAs altered.

Using this same example, the OANG could not provide any documentation or references as to how it decided the actual amount of airspace required to meet its mission or even to train with a specific type of aircraft. For example, if you fly one F-4, the training syllabus might require a volume of 1000 cubic miles of SUA. Two F-4s require 2000 cubic miles and a squadron of F-4s requires 20,000 cubic miles.

Regardless, the military is unable to provide this type of documentation of need. An Air Force Major simply sits down with a chart and pencil, and without asking the Navy or Marines and certainly without dealing with the residents living below a proposed SUA, draws lines around the least populated areas and then awaits the FAA's OK.

An interesting consequence of these gross inefficiencies is the fact that more than 50% of our airspace is allocated for military use which represent about 1/10th of the number of aircraft, pilots and flying hours.

[B] Interservice Rivalries

As noted above, there is little coordination in airspace planning between the various military agencies. This inability to share on a fundamental level is not new. In airspace matters the result is an exacerbation of existing inefficient airspace utilization, lack of concern for the impacts on rural Americans and the creation of forces that act to the detriment of national security and the nation's best interest.

The entrenched nature of this aspect of the airspace problem is another reason why I believe that **S.1584** will fall short of the high goals that lie behind it. This is an old problem and despite the military's increasingly tiresome euphemisms, their inability to effect serious coordination in defense training, works to the detriment of the national security. Interagency squabbling was the primary reason the Soviets put Sputnik up before the U.S. could place an artificial satellite. This is a deeply entrenched, resistant to reform, type of problem. Its solution requires direct legislative control.

Only airspace legislative equivalent of the Engle Act will generate sufficient force to drive the stake into the heart of this enemy of freedom.

[C] Military and FAA Avoid Public Accountability in Airspace Matters

Many of the previously mentioned points arise from the fact that allocation of a national resource (airspace) amounts to an interagency swap that, for all intents and purposes, does not utilize public input, is not accountable to uninvolved civilians, nor is it accountable to our elected representatives.

S.1584 attempts to address this point, but as the culprits in this story already are celebrating their outstanding compliance with NEPA, the lack of public accountability will allow the misuse of our airspace to continue.

S.1584, amended to make direct Congressional oversight for use and allocation of airspace mandatory, holds promise of being a truly effective solution to the problem.

[D] Failure to comply with existing regulations

This is discussed elsewhere in more detail. The military's unwarranted arrogance in airspace matters creates the sad and ironic situation in which the military, pledged to defend the Constitution, considers itself above the laws of the land.

S. 1584 should be amended to include a detailed, time delimited, national review of all SUA/MTR, followed by mandatory compliance of all these airspaces with all existing FAA regulations. This would represent a major step forward. As presently written, **S. 1584** would not affect this major aspect of the airspace problem.

[E] Failure to Internalize the Costs of Military Projects
(in this case, military aviation training)

Congress must act to ensure that the inevitable costs of government would be shared by the public which enjoys the benefits of the government's activities. To permit the infliction of harm such as that caused by the sonic boom of a military aircraft to go uncompensated, constitutes an almost barbarous method of allocating the inevitable costs of military operations.

Share the burden: programs to compensate rural residents and for SOAs, to clear underlying territory if necessary. Technology, although part of the problem may also, in the form of simulators, provide part of the answer. The military will have to be moved in this direction. When all the costs of training are internalized, simulator technology may be a very cost effective method of achieving military training goals.

While the legal aspects of the airspace problems are not dealt with in this testimony, suffice it to say that the **Restatement of Torts** considers supersonic flight and certainly low altitude supersonic ACM as an **ultrahazardous activity**. Unfortunately, at present the government does not have absolute liability for untoward effects of supersonic ACM. There is no recourse for the afflicted citizen for any actions brought under the **Federal Torts Claims Act** have been tossed out because of the discretionary function exemption.

For the boom-suffering citizen, "the paucity of legal remedies calls for intensive, careful analysis. A new injury demands a new remedy."

Presently, the entire burden of loss is placed upon the individual damaged, not only by supersonic flights, but also by any other ultrahazardous activity. Pertinent to harmful military actions in rural airspace, one legal commentator stated:

> **Allocation of risk of loss is one of the fundamental functions of law in a system which recognizes that the social costs of damages should not, as far as possible, remain external to the enterprise that has created them. Neither the assumptions of our legal system nor the democratic traditions of our political system justify excusing governmental enterprises from public responsibility.**

The known and predictable tendency of governmental agencies to violate citizen's Constitutional rights, is 'strengthened' by the diminutive political power that sparsely settled regions can usually bring to bear. A factor operating synergistically with the above is the generally small amount of economic power found in rural remote areas

The **public health problem** that has resulted or will result from exposure of scattered populations to years of intense sonic booms, EMR, etc, will be difficult to study and even more difficult to bring to the attention of legislators and those who could act to stop the situation from developing in the first place.

It sounds crude, but its a well supported observation that many of those who do not live in sparsely inhabited regions, are constitutionally incapable of appreciating the qualities of peace, solitude, and natural expansiveness, that drew many rural residents to these regions initially. Its a fine paradox to have a military pilot, who comes from Brooklyn, claim that the Reese River Valley is a wasteland.

The point made above is actually very important. While many urban groups have outstanding records of protecting civil and constitutional rights, along with the quality of the environment, there is a genuine inability of those doing the impacting to understand the reality of the world of rural America.

In the U.S. Washington and Alaska are the next areas slated for TACTS introduction. The Alaska Air Command announced in January 1988, that a TACTS will be installed over a rural area in Alaska. The military has stated that a TACTS is useless without a SOA, with the attending impacts of destructive sonic booms. It is unlikely that government in Alaska, and certainly the rural Alaskans who will be impacted, have no idea of what is coming down over their heads.

Lastly, it is clear that we are also dealing with an **international** problem. The technology involved in these questions is widespread. F14s, F18s are found in a number of countries. The TACTS sold by Cubic Corporation of San Diego, exclusively through the U.S. Navy, will be placed in many regions and in each case, the increase in military air traffic, creation of SOAs in the same range, all contribute to the loss of tolerable lifestyle for residents living in the region.

Nearly 50,000 square miles in Labrador are slated for an aerial warfare range. Problems in third world countries, even those that the U.S. will not export TACTS to, is already a problem for the rural minorities.

Property Owner's Property Rights in Airspace Unlawfully Taken by FAA and Military Air

This point is the most important aspect of all ongoing considerations of airspace misuse. It also represents the point of greatest leverage available to solve the problem.

The present problem has arisen in part because of federal government agency actions which show a **disregard for the airspace rights of property owners** in rural America.

The Uniform State Law on Aeronautics in 1922, which remains on the books in Nevada, clearly states that a private property owner has rights in airspace, actual property rights. He can buy, sell, lease and subdivide his airspace to at least 500 feet AGL. Property owner's property rights in airspace can be obtained to navigable airspace also.

The military and the FAA operate under the following incorrect and unlawful assumptions:

[a]

The federal government owns and has property rights to all the nation's airspace

[b]

The FAA has the authority from Congress to allocate airspace that is **non-navigable** airspace.

The facts are that Congress regulates airspace under the provisions of the **Commerce Clause** of the Constitution. Despite the widespread misconceptions stated above, the sum total of federal and state statutory law is as quoted from Professor Wright:

> Congressional enactments
>
> **(a)**
>
> have asserted national sovereignty and control over navigable airspace, with
>
> **(b)**
>
> a corresponding free right of passage by aircraft through such space, but
>
> **(c)**
>
> without making any definitive statement on ownership of non-navigable airspace and without even placing any limitations on ownership of navigable airspace other than to provide a right of use of such space for air traffic.
>
> **[Professor Robert Wright, The Law of Airspace]**

The Uniform State Law for Aeronautics was approved by the National Conference of Commissioners on Uniform State Laws in 1922. The Uniform Law, as **current law in Nevada today**, states (**NRS 493.030**):

> **Sovereignty in the space above the lands and water of this state is declared to rest in the state, except where granted to and assumed by the United States pursuant to a constitutional grant from the people of the state.**

NRS 493.040 states that **ownership of the airspace in the state is vested in the several owners of the surface.** As a constitutional grant never occurred, this is a declaration by federal legislation that you own the airspace, through at least 500 feet above the ground.

This declaration is independent of the regulation of the "navigable airspace" which Congress claims to have authority over by virtue of the Commerce clause of the constitution.

Consequently, there are two reasons why the FAA's allocation of airspace for military training over my rural home, below 500 feet over the ground, is unlawful.

The **first** reason is that this violates the FA Act's limitation of FAA authority to **navigable airspace**, which in rural areas is above 500 feet AGL.

The **second** reason is as mentioned: the Uniform State Law for Aeronautics was adopted by Nevada and grants property ownership of the airspace over private property, to at least 500 feet AGL, to the property owner.

To re-emphasize in Professor Wright's words:

except for its establishment of a right of transit through navigable airspace, Congress never entered into the airspace ownership argument, choosing quite appropriately to view

that as a local property matter to be determined by state law.

The present situation of airspace allocation is illegal: the FAA acquiesces to the military unlawful request for private airspace, and by granting such a request for non-navigable airspace, furthers an unconstitutional fraud (as opposed to a constitutional fraud?) by actually claiming a property owner's airspace, right down to the surface of his yard, and giving it to a government agency to fly aircraft through.

One reason that this illegality continues is that property owners are aware only that they are being harassed but because the airspace charade occurs behind closed doors, there is no one to complain to.

Any **legislation that hopes to ameliorate the current airspace problems must have provisions reaffirming and protecting the laws granting property owners the property rights in the airspace above their property and that no one, no agency can violate those rights, even in rural areas.**

Remedial legislation in airspace must have provisions which protect the airspace rights of Native Americans. Having been shunted onto reservations that are in the more remote regions of the country and then finding that these remote regions are now becoming atmospheric garbage dumps for all the noise and sonic booms that other society won't tolerate, this minority is suffering constitutional violations from military airspace activities, to the extent that any reasonable person would find difficult to believe this is happening in the United States.

Please refer to the chapter on the Papago Indians in the book I sent to you last year, entitled ***"Sonic Booms vs. the American Way."*** The mildest term that can be used to describe the military actions taking place immediately above this minority, is "disgraceful." The habits causing the above mentioned violations are so entrenched, that without a specific provision in **S.1584** to ameliorate these assaults, the problem (to the degree that it fosters the impression of solving the problem) may actually be aggravated by passage of this bill.

This airspace bill should have provisions mandating a **review the export of our air combat training technology** (TACTS, etc), not for security reasons but for its impacts on the demographically defined minorities of other nations, groups which will be affected adversely as are rural Americans at present.

Legal recourse for injured citizens living under SOAs, does not now exist. Amend **S.1584** with a clause mandating immediate review of the **Federal Torts Claims Act** by Congress. The **FTCA** offers no protection to rural Americans who live under an SOA and who might have an industrial accident or home accident triggered by the startle reaction to an intense sonic boom. Roughly analogous cases have been dismissed by the courts because the federal government claims immunity under the **discretionary function exemption** of the **FTCA**.

If **S.1584** triggered the future amendment of the **FTCA**, this would force the government to accept responsibility for the adverse impacts on rural citizens generated by low altitude supersonic air-combat training. Supersonic ACM below 30,000 feet MSL is legally an **ultrahazardous activity** conducted by the government, an activity for which the government should be **absolutely liable**, but isn't.

Finally, **S.1584** should contain a provision that forces the FAA to live up to its mandate from Congress and its own regulations regarding the investigation of violations of the **Federal Aviation Regulations** by military aircraft.

Assuming for the sake of this argument that the FAAs allocation of airspace below 500 feet AGL over private property is lawful, when in rural areas military aircraft fly within 500 feet of a person, vehicle, vessel or structure, violation of **FAR 91.79(c)** has occurred. This is a very common occurrence. Violation reports are to go to the FAA, not the local military base. The FAA is required to compile the information, send it to the DOD for further investigation and action. The DOD is required to reply to the FAA with a report providing the disposition of the action.

Despite numbers of well documented FAR violation reports by military aircraft, filed with the FAA — some supported by photographs — the FAA has not taken action on even one report.

For this testimony, I've included copies of several of these FAR violation reports, along with the FAAs response. I would like them included in the hearing record.

In addition, the last FAR violation report I filed, backed by glossy 8x10 noncolor photographs, detailed calculations demonstrating the violation, was ignored by the FAA. I've asked Citizen Alert in Reno, which has the only other copy of these photographs, to send you that file. When it arrives I would like it included in my testimony and put into the hearing record on **S.1584**.

Review of S.1584

General Comments (in addition to those above)

[1]

S.1584 is a start but doesn't address the fundamental problems. Although somewhat limited, I believe the provisions in **H.R.1584** actually cut closer to the heart of the problem.

NEPA compliance is already the stated religion of everyone involved in causing the problem, yet the airspace problem flourishes, fertilized by governmental disregard of the spirit of the law and the FAAs spineless approach to regulatory enforcement.

[2]

S.1584 doesn't create a mechanism to deal with the rapidly expansion of what I've termed "unofficial airspaces."

[3]

S.1584 doesn't ensure that public accountability for national resource allocation is revived. Again, the military and the FAA already argue that they comply with all the requirements of NEPA.

[4]

S.1584 must be amended to address the **fundamental issues** which were outlined above.

- responsive government that obeys the existing laws,
- re-confirmation of the importance of protecting the rights of **each individual**, without regard for the demographics of the region this individual lives,
- affirmation of the principle that agencies sworn to protect the Constitution cannot do so by conducting training in such a fashion that the rights of individual rural Americans are violated. For example, part of the cost of supersonic training is without question, the costs

of obtaining uninhabited areas over which to train. This cost may include buying the airspace rights of thousands of rural residents. Anything less however, violates citizens' 5th Amendment rights.

- **S. 1584** should be amended to strongly re-affirm the limitations on the FAAs authority to designate airspace. Non-navigable airspace does not fall under the purview of the FAA.
- **S. 1584** should be amended to force the federal agencies to cease their unlawful actions in allocating privately owned airspace. Placing a MOA, a MTR or a restricted area over my rural home, with the base at 200 AGL, 100 feet AGL or even at the surface, is a violation of statutory law and my Constitutional protections.

The government has ignored the attempts of individuals to rectify its misbehavior on this point, so now the stake of private airspace ownership will have to be driven into the FAAs moribund regulatory heart with a legislative hammer.

Specific Comments on S. 1584

[A] **Section One**: to require an airspace review based upon a change in the type of military aircraft in use in SUA, is not really practical. The problems arise from major changes in speed (supersonic), electromagnetic radiation — including laser targeting—, very low altitude overflights, changes in hours (night time), use of FLIR to greatly expand low altitude night time training, and so on.

Expansion airspace can be altered considerably without necessarily being expanded by volume.

[B] **Section Two**: **S. 1584** mandates an ES. This mandate, as written, can be easily circumvented, as even now, EAs are required, but not complied with by the agencies. The rules are already on the books but enforcement is lacking and remains lacking under this bill.

[C] **Section Three**: semi-annual review of SUA is not practical. Once an area is established and the utilization reviews support the use initially proposed for an airspace, then yearly reviews should be adequate to monitor compliance.

Other specific comments on **S. 1584** are noted throughout the testimony above. The primary drift is that private ownership of airspace must be recognized, the FAA must restrict itself to only allocating airspace over which it has authority, existing rules and regulations must be enforced by some mechanism.

Furthermore, the military air arms, faced with a diminishing, limited national airspace resource, must make serious efforts to increase utilization efficiency of existing airspaces, perhaps supplementing training with **simulators**, and coordinating military airspace needs and complexes, at the level of the Department of Defense. This would obviously take some planning, an activity that the military is rather good at, if coerced by legislation.

Other far reaching possibilities should also be considered. The present situation has at least one root that rises from the two year military funds appropriation cycle. The benefits may outweigh the adverse effects, but funding the military in a three to four year cycle would help alleviate some of the airspace problems. I won't digress into this question however.

Existing airspaces for military aircombat training are not adequate from the military's point of view. This fact creates a further hidden drain on the taxpayer's of the nation because military pilot training cannot be maximized in an environment that is so tightly, often awkwardly, controlled.

Contemporary species of military airspace and the uses for which they are intended, deserve a complete re-structuring.

There are few SUAs, even in Nevada, which are not so encumbered by various restrictions, in which the pilots are not so encumbered by self-imposed limitations designed to keep the airspace situation stable, that the military pilots can actually be trained to the best of their abilities.

The military and consequently, the country, would be better served by acting on the results of a high-level military review of its airspace needs. I believe one solution to the ragtag, motheaten airspace draped like a unplanned spider's web over the U.S., would be to create several **national airspace complexes,** each covering at least 40,000 square miles. Low altitude routes planned for maximal training value and established with full regard to the legal rights of property owners to their airspace, would create conditions in which the military could fulfill the training syllabi for varied low altitude training needs.

All residents under such **national sacrifice airspaces** would be given full protection of their constitutional rights. They could sell their airspace and/or their entire property or lease it for 30 or 40 years. The government has the power of eminent domain and **would** condemn everyone living under a proposed supersonic training range. These rural citizens would be additionally protected by the government's assumption of absolute liability for ultrahazardous activity occurring in the airspace above.

These airspaces could be planned for maximum training value and maximum utilization rates. The costs would be great but would scarcely approximate the cost of one Trident submarine.

However, the costs would not **actually** be greater than they are now. That costs would increase under this proposal, is actually an illusion generated by the present haphazard situation wherein these very real costs, which are a concomitant of aircombat training, rather than being a burden borne by the general society, have become a source of constitutional violations by being unlawfully dumped onto the backs of a demographically-defined minority, the long suffering rural Americans.

The Road (or Flight Path) to Airspace Solutions

[1]

As citizens become aware of what we're calling the airspace problem and begin searching for solutions to these very real problems, their first unnatural impulse is to look to the FAA for assistance. Before leaning their wounded bosoms against the FAA's regulatory grindstone however, those having past experience with bureaucratic remedies remain prepared to fend off all cures that are worse than the illness.

It's dismaying to realize that existing procedures and regulations — if used as intended — would expedite the resolution of present and impending airspace blues. Rural Americans and civilian pilots must however, guard themselves to keep from being deceived by the illusory hope that once the FAA recognizes the magnitude of the threat to general aviation and rural ground dwellers, the chill of airspace rehabilitation will shiver down whatever remains of its bureaucratic spine.

[2]

There are two main roads leading to an airspace solution. The first road, called the ***Pro Bono Memorial Highway,*** runs directly into the federal court house. This Highway follows a straight and narrow course but travel conditions are poor because the path is littered with the bodies of naive looking Americans.

The other main road runs directly into the House of Congress, terminating in ***The Hallway of Hard Hitting Legislation***. History shows that the legislative restraints placed on the Department of Defense must be exceedingly hardy because the fundamental problem which has caused the present crisis, arises from chronic governmental misbehavior which is guaranteed to recur in the future.

Patchwork attempts to remedy the airspace problem will, at best, be useless and at worst will add to the confusion. Three decades ago, patchwork attempts were made to control the raging military acquisition of public lands (prior to passage of the Engle Act in 1958). Legislators were flummoxed by the many ways the military circumvented their 'soft' fixes.

Not until Congress reasserted its constitutionally granted authority and grabbed hold of the reins directly (by passing the Engle Act), did the decades-long run-away of the DOD's public land-grab stagecoach come screeching to a reluctant halt.

> **...The gentleman asks whether we have got the Navy stopped. We have locked the front door, the back door, we have locked the windows, and then they come down the chimney, so now we have got the chimney blocked, I think.**
> [Congressman Engle, 1957, Congressional Record p.5526]

In this matter of rectifying misuse of a national resource, history clearly teaches citizens and legislators that **a hard legislative fix** is our only hope of ensuring the protection of our airspace, its users and those living below. Any lesser, softer, legislation will merely postpone the day of reckoning when Congress will have to bite the legislative bullet and act to create a permanent solution to the nation's airspace woes.

Passage of an **Engle Act of the Air** is, in my opinion, the only approach which offers a more than 50% chance for long term success.

[3]

Ensure military compliance with existing statutory law and regulations. This involves **review of documentation for all SUA**, the accompanying EAs, proper public review, and so on. This information can be obtained through the **Freedom of Information Act**. It is in the interests of the military and the national defense to make efficient use of technology and airspace.

[4]

MTR's contribute to much of the rural aggravation and must be classed as SUA; MTRs should require public hearings prior to designation. The FAA should be reminded of its powers to revoke and modify airspace. Perhaps a small test airspace could be formed near Washington D.C. so that the FAA could practice revoking it, thereby gaining enough confidence in this statutorily established procedure to try the method on a real problem SUA, such as R4803.

[5]

Make the FAA responsive to citizen petitions for revocation or modification of SUA airspace, under:

Title 14, Chapter I,Subchapter B,Part II,Subpart B,*11.75.

[6] **Real estate clause:** **perhaps the most important**

[redacted]

suggestion for addition to S.1584. It would seem possible to make it mandatory that all real estate transactions or contracts include a description of the airspace above a property. If the airspace to the surface has been unlawfully taken by the military, this should be part of the disclosure in the contract, just as land easements are disclosed. By making citizens knowledgeable about the abuses in air rights, a larger group of people become involved. Besides, it generates reform from concern about the pockebook.

[7] Amend S.1584 to make it the equivalent of an **Engle Act of the Air.**

[8] Establish Standards in S.1584, mandating:

Supersonic ACM in restricted airspace
Supersonic ACM over uninhabited territory only.

[9] Reaffirm the right of ownership of airspace in rural America.

Note: While many of these comments on **S.1584** appear to be written from a negative point of view, I would like to stress that I'm delighted to see this bill out for public hearings and comments. Only a few years ago, the hope for such an airspace bill was more of a dream than a realistic hope.

Senator Reid took an interest in the airspace problem long before it became fashionable, long before any of the urban centers became interested and long before the other legislators were dragged unwillingly to view a problem that actually directly impacted only a small percentage of the population.

Senator Reid's interest, even while a Congressman, represented one of the rays of hope illuminating the gloomy picture of a few stubborn, rural Americans struggling against immense, intractable bureaucracies.

There's a country and western song in which Tammy Wynette? sings that she ***"was country when country wasn't cool."*** Similarly for this airspace issue, the awareness of which is now reaching national levels, Senator Reid took an interest long before such an interest became "cool."

So please take these comments in that light. **S.1584** is a good start and I believe that by addressing a few additional fundamentals, the bill would be even stronger and could actually generate a solution to the ***airspace problem*** now assaulting ground dwellers, civil aviation and military aviation.

This is a complex issue arising from a few fundamental roots. I have touched on the more central issues and offered opinions that are supported by the evidence and can be implemented by amending the very welcome legislation proposed in **S.1584.**

Sincerely,
Richard Bargen
Richard Bargen, MD.

STATEMENT BY THE
NEVADA LEGISLATURE'S COMMITTEE ON PUBLIC LANDS
TO THE
UNITED STATES SENATE'S COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS

REFERENCE S.1584--THE AIRSPACE PROTECTION ACT SPONSORED BY
U.S. SENATOR HARRY REID

JANUARY 14, 1988
SPARKS, NEVADA

MR. CHAIRMAN AND MEMBERS OF THE COMMITTEE:

MY NAME IS BRIAN DAVIE, PRINCIPAL RESEARCH ANALYST IN THE RESEARCH DIVISION OF NEVADA'S LEGISLATIVE COUNSEL BUREAU, AND I SERVE AS THE STAFF DIRECTOR FOR THE NEVADA LEGISLATURE'S COMMITTEE ON PUBLIC LANDS.

NEVADA STATE SENATOR DEAN A. RHOADS, CHAIRMAN OF THE PUBLIC LANDS COMMITTEE, SENDS HIS REGARDS AND REGRETS THAT HE IS UNABLE TO TESTIFY IN PERSON AT THIS HEARING DUE TO PRIOR COMMITMENTS. SENATOR RHOADS REQUESTED THAT I APPEAR FOR HIM ON BEHALF OF THE COMMITTEE TO PROVIDE THE FOLLOWING TESTIMONY.

THE NEVADA LEGISLATURE'S COMMITTEE ON PUBLIC LANDS HAS DEVOTED EXTENSIVE TIME AND ATTENTION TO THE ISSUE OF EXISTING AND PROPOSED LAND WITHDRAWALS AND THE DESIGNATION AND RESTRICTION OF AIRSPACE BY THE MILITARY IN NEVADA.

DURING THE 1985-1986 INTERIM PERIOD BETWEEN LEGISLATIVE SESSIONS IN NEVADA, THE COMMITTEE CONDUCTED HEARINGS, HEARD TESTIMONY FROM REPRESENTATIVES OF THE MILITARY AND FROM CITIZENS IN NEVADA RELATING TO THE AIRSPACE ISSUE, AND PARTICIPATED IN THE INFORMAL

AIRSPACE HEARINGS CONDUCTED BY THE FEDERAL AVIATION ADMINISTRATION (FAA) CONCERNING THE DESIGNATION OF THE HART MILITARY OPERATIONS AREA IN NORTHWEST NEVADA.

DUE TO THIS INVOLVEMENT, THE COMMITTEE PARTICULARLY BECAME CONCERNED ABOUT THE APPARENT LACK OF PROCEDURES, CONTROL AND OPPORTUNITIES FOR PUBLIC INPUT OVER DECISIONS BY THE MILITARY AND THE FAA TO DESIGNATE AND RESTRICT AIRSPACE IN NEVADA AND THROUGHOUT THE NATION.

AS A RESULT, THE COMMITTEE COMMUNICATED ITS CONCERNS TO THE U.S. CONGRESS AND NEVADA'S CONGRESSIONAL DELEGATION, AND RECOMMENDED THAT THE 1987 SESSION OF THE NEVADA LEGISLATURE ADOPT A JOINT RESOLUTION TO URGE CONGRESS TO:

1. INVESTIGATE THE DESIGNATION AND CONTROL OF MILITARY AIRSPACE BY THE FAA; AND

2. ENACT LEGISLATION TO ENHANCE PUBLIC PARTICIPATION IN THE PROCESS OF ESTABLISHING AIRSPACE CLASSIFICATIONS AND RESTRICTIONS.

THE 1987 NEVADA LEGISLATURE RESPONDED BY ADOPTING SENATE JOINT RESOLUTION NO. 6 (FILE NO. 72) WHICH INCLUDES THESE RECOMMENDATIONS. THE VOTE ON THIS RESOLUTION WAS NEARLY UNANIMOUS WITH ONLY ONE DISSENTING VOTE OUT OF 64 MEMBERS IN THE NEVADA LEGISLATURE.

THE FOLLOWING IS THE TEXT OF THAT RESOLUTION:

SENATE JOINT RESOLUTION NO. 6--COMMITTEE ON NATURAL RESOURCES

FILE NO. 72

SENATE JOINT RESOLUTION--URGING CONGRESS TO INVESTIGATE THE DESIGNATION AND CONTROL OF MILITARY AIRSPACE AND ENACT LEGISLATION TO ENHANCE PUBLIC PARTICIPATION IN THE PROCESS OF ESTABLISHING CLASSIFICATIONS OF AIRSPACE AND RESTRICTIONS ON ITS USE.

WHEREAS, THE MEMBERS OF THE LEGISLATIVE COMMITTEE ON PUBLIC LANDS AND THE RESIDENTS OF NEVADA SUPPORT AND RESPECT THE MILITARY; AND

WHEREAS, THESE GROUPS UNDERSTAND THE NEED FOR REALISTIC TRAINING FOR PILOTS IN THE MILITARY TO PROVIDE FOR A STRONG DEFENSE; AND

WHEREAS, THE DEPARTMENT OF DEFENSE NOW CONTROLS NEARLY 40 PERCENT OF ALL AIRSPACE IN NEVADA, YET MANY INCIDENTS OF LOW-FLYING MILITARY AIRCRAFT OCCUR IN AREAS NOT DESIGNATED FOR MILITARY USE; AND

WHEREAS, THE RESIDENTS OF NEVADA QUESTION THE DESIGNATION OF ADDITIONAL AIRSPACE FOR MILITARY USE WHEN THE DEPARTMENT OF DEFENSE AND THE FEDERAL AVIATION ADMINISTRATION FAIL TO ENFORCE THE LIMITS ON THE AREA AND THE ALTITUDE OF EXISTING DESIGNATIONS OF AIRSPACE; AND

WHEREAS, THE LACK OF ADEQUATE PROCEDURES TO PROVIDE FOR PUBLIC COMMENT ON PROPOSALS CONCERNING AIRSPACE RESULTS IN EXTREME FRUSTRATION AND FEELINGS OF POWERLESSNESS OVER THE INABILITY TO EXPRESS OPINIONS BEFORE DECISIONS ARE MADE; NOW, THEREFORE, BE IT

RESOLVED BY THE SENATE AND ASSEMBLY OF THE STATE OF NEVADA, JOINTLY, THAT THE NEVADA LEGISLATURE URGES CONGRESS TO INVESTIGATE THE DESIGNATION AND CONTROL OF MILITARY AIRSPACE BY THE FEDERAL AVIATION ADMINISTRATION; AND BE IT FURTHER

RESOLVED, THAT THE LEGISLATURE ENCOURAGES CONGRESS TO ENACT LEGISLATION TO ENHANCE PUBLIC PARTICIPATION IN THE PROCESS OF ESTABLISHING CLASSIFICATIONS OF AIRSPACE AND RESTRICTIONS ON ITS USE; AND BE IT FURTHER

RESOLVED, THAT A COPY OF THIS RESOLUTION BE PREPARED AND TRANSMITTED BY THE SECRETARY OF THE SENATE TO THE VICE PRESIDENT OF THE UNITED STATES AS PRESIDING OFFICER OF THE SENATE, THE SPEAKER OF THE HOUSE OF REPRESENTATIVES AND EACH MEMBER OF THE NEVADA CONGRESSIONAL DELEGATION; AND BE IT FURTHER

RESOLVED, THAT THIS RESOLUTION BECOMES EFFECTIVE UPON PASSAGE AND APPROVAL.

THE NEVADA LEGISLATURE'S COMMITTEE ON PUBLIC LANDS HAS REVIEWED S.1584 BUT HAS NOT TAKEN A FORMAL POSITION ON THIS LEGISLATION. HOWEVER, S.1584 APPEARS TO ESTABLISH A PROCEDURE THROUGH THE NATIONAL ENVIRONMENTAL POLICY ACT TO PROVIDE OPPORTUNITIES FOR PUBLIC PARTICIPATION IN DECISIONS TO DESIGNATE AND RESTRICT AIRSPACE. WHETHER THIS APPROACH IS THE MOST OPTIMUM METHOD IS A DECISION FOR THIS CONGRESSIONAL COMMITTEE AND THE U.S. CONGRESS.

WE UNDERSTAND THAT THE MILITARY IS OPPOSED TO THE METHOD WHICH WOULD BE ESTABLISHED UNDER S.1584. IF THAT IS THE CASE, THE NEVADA LEGISLATURE'S COMMITTEE ON PUBLIC LANDS WOULD CHALLENGE THE DEPARTMENT OF DEFENSE TO RECOMMEND AND IMPLEMENT AN ADEQUATE AND DEFINITIVE PROCEDURE TO ALLOW PUBLIC PARTICIPATION AND THE CONSIDERATION OF ENVIRONMENTAL EFFECTS IN ALL FUTURE AIRSPACE DECISIONS.

ON BEHALF OF THE CHAIRMAN AND MEMBERS OF THE NEVADA LEGISLATURE'S COMMITTEE ON PUBLIC LANDS, WE WOULD LIKE TO THANK YOU AND COMMEND YOU FOR ADDRESSING THE AIRSPACE ISSUE, FOR CONDUCTING THIS CONGRESSIONAL HEARING IN NEVADA, AND FOR PROVIDING THIS OPPORTUNITY FOR THE COMMITTEE AND THE CITIZENS OF NEVADA TO EXPRESS THEIR VIEWS.

BD/dr:STATEMENT1-4:1/11/88

AOPA
AIRCRAFT OWNERS & PILOTS ASSOCIATION
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STATEMENT OF JOHN L. BAKER, PRESIDENT
AIRCRAFT OWNERS AND PILOTS ASSOCIATION

REGARDING SPECIAL USE AIRSPACE
FIELD HEARING

ENVIRONMENT AND PUBLIC WORKS COMMITTEE
SUBCOMMITTEE ON HAZARDOUS WASTE AND TOXIC SUBSTANCES
HONORABLE MAX BAUCUS, CHAIRMAN

THURSDAY, JANUARY 14, 1988

Mr. Chairman, I am John Baker, President of the Aircraft Owners and Pilots Association (AOPA). We share your concerns regarding the designation and expansion of special use airspace (SUA), and we appreciate the opportunity to appear before this subcommittee.

AOPA represents the national aviation interests of 264,000 aircraft owners and pilots who fly general aviation aircraft for business and personal transportation. General aviation is the largest segment of airspace and airport users, comprising 98 percent of all U.S. civil aircraft, 96 percent of all pilots, and 85 percent of the annual civil aircraft flying hours. General aviation consists of more than 700,000 pilots flying more than 210,000 aircraft approximately 35 million hours a year. By comparison, U.S. air carriers operate only 4,370 aircraft and fly just 20 percent of the hours general aviation does on an annual basis.

As a result, our members are the chief beneficiaries of airspace safety and capacity improvements. For every airliner that takes off, 50 general aviation departures occur. For every airport served by an airline, general aviation serves 24. Clearly, our interest in airspace modernization is a continuing one. We want to ensure that what we receive for our tax-contributed dollars is a system that will assure safety and utility.

GENERAL AVIATION PERSPECTIVES

We have been concerned with the complex special use airspace issues facing the Federal Aviation Administration (FAA) airspace planners for years. Increased military requests for additional SUA and military training routes during an era of escalating civil demand for airspace, especially in the states of Nevada, Florida, South Dakota, and North Carolina, are of particular concern to us.

The airspace is a finite resource and according to FAA, the military services currently have allocated to them one million square miles or the equivalent of all airspace east of the Mississippi River. While the military currently controls almost one-half of the airspace, it represents less than 15 percent of the air traffic operations and eight percent of the aircraft used in the United States. In our experience, over-zealous expansion of SUA without sufficient environmental and civil user participation has resulted in reduced access to public airports and inefficiency in the national airspace system in the form of delays and indirect routing.

AOPA recognizes the importance of providing the military services sufficient SUA to maintain a high level of military preparedness. We realize that today's advanced military aircraft have outgrown some of the currently designated SUA areas. The deployment of more capable aircraft and technologically sophisticated ground and in-flight equipment has led the military to seek more usable airspace with both larger horizontal boundaries and expanded altitude designation to meet their training and proficiency requirements.

We and other civil airspace users believe that the military's legitimate needs can be met without jeopardizing the natural environment or unnecessarily restricting civilian air traffic. The current pattern of laws, regulations, and practices have permitted the development of some SUAs that are characterized by sporadic, inefficient use.

It is important to note that civil and military coordination of airspace use is only one part of the overall "joint use" issue that also includes the sharing of national airport resources. Adequate general aviation accommodation at airports in many metropolitan areas is at great risk. Prime factors involve moderate to severe congestion at major hub airports, the loss of privately owned public-use airports, lack of tiedown and/or hangar space at many existing general aviation and reliever airports, and many other considerations.

Some of these major metropolitan areas have military airfields which could accommodate some level of general aviation activity. Language in the Airport and Airway Improvement Act of 1982 required the Secretary of Defense to "...indicate the extent of which domestic military airports and airport facilities will be available for civil use." We feel the final study was somewhat superficial and would like to see another one broader in scope which would involve direct input from various national aviation groups.

AOPA has strongly advocated this study proposal in the new Airport and Airway legislation which was signed into law on December 30, 1987.

PROPOSED LEGISLATION

We support Senator Reid's efforts to open the airspace process to the full aviation community. AOPA fully supports the bill's designation of the FAA as the lead federal agency and the requirement for at least semiannual reviews of continuing SUA designation.

We agree that the aviation community needs to be part of the SUA designation process. However, section one of the bill that would define expansion of special use airspace as any change in physical dimension, change in the activity or change in airspeed or type of aircraft is unnecessarily restrictive and does not permit the military services sufficient flexibility to satisfy their important training needs in a practical and cost-effective manner. The military must be free to change the characteristics of operations in SUAs and change the type or operation of aircraft mixed together in order to achieve efficient use of their equipment, personnel and allocated airspace. We suggest that section one be rewritten to emphasize that proposed new SUA or significant modification or expansion of existing SUA must go through an "open" approval process that is administered by FAA and is available to the public.

RECENT ACTION ON SUAs

In March of last year, the United States General Accounting Office (GAO) identified the need for better, more comprehensive short- and long-range airspace planning by the Department of Defense. GAO agreed that to the greatest extent possible, DOD airspace planning information should be shared with the FAA, the affected states, and the civilian aviation community in order to promote cooperation and coordination among all legitimate national airspace users. As a result of the GAO recommendations, we believe optimum use of our airspace requires mutual understanding and more productive working relationships between all users and FAA. Past agency decisions have been characterized by a lack of public hearings or informal meetings with users, and the preliminary studies which are conducted are not normally made available to the public. GAO summarized its key findings as follows:

> A. "Primarily because airspace was more readily available in the past and less was needed, the services have not developed long-range plans defining airspace needs and how those needs will be met. For the most part, individual military units are responsible for initiating proposals for additional airspace on a case-by-case basis when airspace shortages are identified."
>
> B. "The services recognize that changes in this approach are needed and have initiated steps to improve planning. The Navy, in particular, has begun an effort to define, validate, and support its future airspace requirements. However, the other services have not committed themselves to such comprehensive, long-range planning, and there is no DOD guidance to ensure consistency and service coordination in future military airspace development"
>
> C. "FAA and several states have expressed the need for better airspace planning information from DOD. Some states view DOD's airspace planning as piecemeal and believe that their aviation and economic development planning is hampered by the lack of DOD long-range airspace planning. FAA officials stated that FAA could do a better job in allocating airspace and in avoiding future conflicts if DOD airspace planning information were available."

Partly in response to the March 1987 GAO report and AOPA concerns, both the military and the FAA have recently taken steps to establish better airspace coordination and planning. For example, in the FAA southern region, the military and the FAA have increased their efforts to meet with local communities and airspace users to discuss specific airspace needs and problems. One recent proposal to expand SUA in North Carolina met with a great deal of public opposition based on justifiable environmental and airspace access concerns. As a result, the Navy and FAA representatives have invited state, environmental, and civil aviation representatives to discuss the issue further before making a decision on the proposal.

As another example, in Florida, both the Miami and Jacksonville air traffic control facilities are hosting regular user meetings to address new and on-going SUA issues to ensure maximum airspace availability for all users. This is an excellent example of the kind of dialogue and cooperation that should be expanded to other areas.

To meet its long-term planning needs, DOD has sent military task groups to the southern region to gather airspace activity data, discuss present and future airspace requirements, and to learn about the particular SUA problems facing the southern states. These task groups are the first in the field and are soon to be joined by other military representatives who will be reviewing SUA nationwide. The information compiled by these task groups will help the military identify specific environmental and user problems in each state. It will provide the data necessary to make more efficient use of existing airspace and develop comprehensive national airspace plans for the future.

NATIONAL FAA/DOD PLANNING

The Federal Aviation Act of 1958 outlines FAA responsibility for safely and efficiently managing the nation's airspace to meet the needs of all users, both civil and military. Although FAA headquarters has final approval authority for airspace proposals, they are initially reviewed by FAA regional airspace managers. These FAA representatives consider the effects of a proposal on the local user communities, make appropriate recommendations to their military counterparts, and then circulate a proposal for public comment. In addition, military services' regulations require that certain proposals, such as those for airspace below 3,000 feet or those involving supersonic flight below 30,000 feet, comply with the National Environmental Policy Act (NEPA). This act requires that the military prepare environmental impact statements that assess the potential environmental impacts of proposed actions and a detailed analysis of all reasonable alternatives.

Statements in response to the recent GAO investigation by FAA representatives indicated that historically poor DOD planning causes both DOD and FAA to make decisions on individual airspace proposals that do not always serve the future needs of the airspace users. Air Force and Navy representatives concurred and stated that "comprehensive airspace planning has not been occurring primarily because airspace matters have not been a high priority in DOD." However, as stated previously, both the FAA and the DOD are taking action to improve airspace planning in both the short- and long-term.

AOPA believes that each state has a role and should be included in the SUA planning process. However, it is vital that the FAA, military, state representatives, and civil users work together to gain an understanding of one anothers airspace needs in order to make responsible decisions on SUA issues. AOPA encourages the states to support local user forums where all airspace users can contribute to solving today's complex SUA problems. As military and civilian airspace users have built stronger working relationships based on a mutual understanding of naturally differing needs, each side has seen the benefits of cooperation.

One recent example of the benefits that have come from cooperation during the airspace planning process is evident in the FAA Great Lakes region. Initially the United States Air Force (USAF) discussed its plans to alter the Chippewa military operations area (MOA) in Michigan with FAA regional representatives, as well as air traffic facility airspace managers. However, the subsequent circulation of the proposal drew strong opposition from state governmental officials and local pilots. The FAA Great Lakes regional representatives responded promptly by providing the state, civil pilots and military officials the opportunity to meet and resolve their conflicts with one another in an informal manner. The result was a mutually acceptable alteration of the USAF proposal which now provides the military with adequate airspace in which to meet their essential defense responsibilities without unneccessarily restricting the flow of civilian aviation.

The responsibility of resolving SUA problems should remain at the FAA regional level where SUA conflicts can be resolved with the guidance of the regional airspace experts. The FAA regional managers are familiar with local terrain characteristics, air traffic control requirements, airline and unscheduled carrier needs, general aviation activities, and environmental concerns. These airspace experts, working closely with state and other user representatives, can respond to meet changes in the local environment.

The FAA regional officials have a close relationship with national FAA and Department of Defense (DOD) airspace planners. The airspace managers at both FAA and DOD headquarters have begun to provide the regional managers with the support and guidance necessary to promote a national system of efficient shared use of our national airspace resource. These individuals are able to evaluate the cumulative effects of local airspace programs on the national airspace plan and provide guidance to ensure that all airspace is used with the highest level of efficiency.

SUMMARY

Improved short- and long-term airspace and airport planning is critical today due to increasing demand for airspace and access by all users. Coordination among the military services and with the civilian airspace users, primarily the FAA, state governmental agencies and civilian aviation users, must be a priority in order to achieve efficient joint use.

The FAA must demonstrate stronger leadership and promote open communications among airspace users as they work toward the development of an efficient, safe, and cost-effective national policy for special use airspace. This can be accomplished by ensuring that the military services develop a comprehensive DOD airspace plan that will validate their requests and designations. It will also require that the FAA and DOD keep their plans current and apply them at both the federal and state level. Finally, it is essential that the FAA as the lead agency share all requests and planning data with the public and civil users in order to achieve equitable and efficient use of the nation's airspace.

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TESTIMONY PRESENTED JANUARY 14, 1988 AT A PUBLIC HEARING

ON SENATE BILL S.1584

I am Wally Runner, Conservation Chairman of the Sierra Club's North Carolina Coastal Group.

The Sierra Club, with more than 400,000 nationwide members, has consistently opposed the misuse of airspace over all lands by military and non-military organizations. On behalf of these Club members, I will address environmental problems with planned military space withdrawal, agency evasion of the National Environmental Policy Act and the possible resulting abuses to air, land and sea environment.

I will relate my presentation to a current Military Operating Area (MOA) withdrawal attempt over 152 square miles of Cape Lookout National Seashore park and 620 square miles of North Carolina's coastal land area.

To lend some credence to the opinions I express, it should be known that I supplied engineering support to the military services from 1943 through 1971 at Muroc Army Air Field, Edwards Air Force Base, many US service facilities and overseas activities in Vietnam. Thailand, Taiwan and the Philippines.

At Edwards AFB I was exposed to the awesome impact of jet aircraft low-level record speed runs and participated in evaluation of low altitude performance flights of new Air Force, Navy, Army and foreign aircraft. I flew at on-the-deck levels at speeds approaching sonic velocity and I witnessed the initial low-level sonic boom property-damage demonstrations.

More than 5200 square miles of airspace above North Carolina's 250 mile coastal shoreline region is controlled by the military for training MOAs or SUAs. None of this withdrawal is shared or jointly utilized by several services. Indeed, some contiguous MOAs are used independently by aircraft from the same branch of the service. Additionally, a massive network of IR and VR military training routes (MTRs) criss-cross between MOAs/SUAs as well as traversing into, out of and across the state.

In spite of the current immense military airspace expanse over North Carolina (approximately 50%), the services are seeking seven added SUAs,- presumably to satisfy training in advanced technology aircraft and weapon systems.

My focus will be on two of the proposals initiated by the US Marine Corps, Cherry Point Station. I will let you decide how it relates to Senate Bill S.1584.

995 square miles of Pamlico Sound, Pamlico River, Neuse River and the surrounding shore regions, including the Department of Interior Cedar Island Wildlife Refuge, were "adopted" by the Marines prior to restrictions of the National Environmental Policy Act. This airspace is labeled Restricted Area R5306A and is the current training range for the Cherry Point Marine pilots.

In 1986 the USMC entertained responses from 16 selected governmental agencies and 4 small general aviation groups during a scoping process related to their plans to extend R5306A at its East and West ends. Nineteen environmental orgaizations active in the proposal area were not contacted/consulted.

In January 1987, taking advantage of the scoping information the USMC issued a draft Environmental Impact Statement proposing to withdraw airspace over 32 miles of the last undisturbed National Biosphere Reserve on the Atlantic Coast,- the pristine Cape Lookout National Seashore park. Sub-sonic flights were planned at 100 feet above 11 miles of the Seashore park. This MOA was titled "CORE". Additionally, the proposal withdrew 750 square miles of space over the upper Pamlico River and the Pungo River areas,- the "CHERRY I" MOA. The net range would be 32 miles wide at the Atlantic Coast and extend inland 64 miles,- an almost perfect rectangle.

In February 1987 two public hearings generated 100% opposition from all environmental groups, general aviation organizations, congressional, federal, state, county and city representatives as well as commercial fishfolk, hunters, boaters, fishers, recreation visitors, residents, etc..

In October 1987, utilizing the negative criticisms of the hearings, the USMC issued a Final EIS correcting a few of the many flaws in the DEIS and offering to raise the minimum altitude over the park to 500 feet. CHERRY I MOA was reduced to 620 square miles. The document did not explore the suggested half dozen alternatives using existing or less sensitive military airspaces. But the FEIS did expose the real reason for adding the MOAs to R5306A. The Department of Defense will propose this airspace for a Mid-Atlantic Electronic Warfare Range which will provide an all-services East Coast electronic-monitored training range comparable to the Fallon/ Yuma ranges.

The park flyovers have been condemned to every pertinent agency head from President Reagan down. North Carolina congressmen, senators, the governor, etc. have written their strong opposition to the park misuse to decisionmaking military and cabinet officers.

It is believed the Secretary of the Navy has blessed this program. The EPA had previously written "no problem" on noise but rumor exists they may be having second thoughts. Based upon its past track record the FAA, with final authority for approving airspace withdrawal, is expected to donate the requested space.

However, at this time the proposal has moved to the president's Council on Environmental Quality for resolution of a Referral of Disagreement by the Department of Interior. I am informed the QEC has requested the Dept. of Interior's Park Service to negotiate with the Marine Corps and FAA to try to resolve the flyover problem by compromise or whatever.

It appears the future of Cape Lookout National Seashore barrier island park is in serious jeopardy. It may become just another landmark on a pilot's low-level, high-speed terrain following system.

I describe the history of this space withdrawal to provide a contemporary example of the arrogant military's insistence of "need" in spite of inadequate "homework", suggestions to prevent park misuse and destructive impacts upon wildlife and the 275,000 residents and visitors below the airspace.

Please note that for brevity I have omitted discussion of the severe negative impacts of the proposal. My purpose is to indicate weaknesses in the withdrawal processes. This is an example wherein the legal advisors of the agency (USMC) insisted they had complied with all requirements of the National Environmental Policy Act. The attorney representing four major environmental organizations, citing case laws, pointed out seven major proposal items not in compliance with NEPA policy provisions and/or regulations. The military charged on.

Conclusion? NEPA policies and regulations are not legally specific enough to prevent evasions or self-serving interpretations.
Will requiring FAA to be (more?) responsible in allowing withdrawals eliminate the evasion/interpretation problem?

January 7, 1988

Star Route
Taylorsville, CA.
95983

Senator Harry Reid
United States Senate
Washington D.C.
20510

Dear Senator Reid:

Thank you for your invitation to comment on the increasing militarization of our skies, for holding a public hearing on this issue in Reno, and for your leadership in bringing this urgent matter to the United States Senate in Senate Bill 1584.

It's difficult to communicate the dread and sadness one feels in the wake of a sonic boom, or beneath a sky that seems to be wailing a constant drone of fighter jets. I, for one, never fully regain myself after an unexpected visitation of black jets in formation above me, never quite recover from the sense of violation I feel, both of myself and America.

Our urban friends may find it hard to understand or even imagine how noise could be a problem in rural, "peaceful" America. Perhaps your bill can help to describe our situation - there's no longer peace nor quiet in rural America; the sky above us is filled with war machines. Ironically, it's the cities now where I find "peace". No fighters hug the curbs of the financial districts the way they do the curving creek of Genessee Valley, Plumas County where I've lived and worked the past ten years. Sonic booms rarely shatter the nerves of urban workers, nor are people in city parks subjected to military maneuvers at tree-top level. And when an urban mother steps out onto a district street in early morning she may hear cars, perhaps a bird, but not the incessant, recurring roar of military overflights. Urban and suburban residents don't know that to live in the country these days is to find oneself beneath a sky that the Department of Defense seems to consider military territory. Perhaps your bill can help awake our representatives to the fact that the very America our armed forces would so zealously defend is being degraded by their own tactics.

A few years ago some one thousand Plumas County residents petitioned the United States Air Force and Navy to re-route their flights elsewhere after sonic booms in our region of the northern Sierra Nevada became unbearable. We have learned since then that if we're not being subjected to the heart-stopping booms, our neighbors to the east or west are probably suffering them. We know what has happened in places like Dixie Valley and are aware that our problem with the Air Force and Navy is a common problem to all people in the rural west. Perhaps your bill can keep other western valleys as beautiful as Dixie from being destroyed by the military in the name of national defense. Since our petition for recourse from sonic booms we have learned that the problem is much more pervasive and threatening to our rural way of life. The sky above us has become a freeway for the military. Even without a sonic boom there's rarely true quiet, but almost always the approaching or diminishing roar of fighters and bombers. Five years ago in Genesee one heard birds, cows, wind, an occasional car and coyotes. Now there are rarely five minutes unbroken by jets, and it feels like rape every time black jets sweep in an instant down the length of the valley. When, unnerved, I've sought re-creation in wilderness, I've found to my dismay the same thing there. In three visits to Bucks Lake Wilderness, Hoover Wilderness, and Yosemite National Park last year I encountered low-level, high-speed maneauvers over narrow mountain passes, sonic booms, and never the freedom from the unhappy anticipation that any moment a jet might swoop down, or a boom crack my being again. I grew up in a wild, and quiet Sierra, and remember and miss what I was taught was our American heritage.

Certainly I, like any reasonable American, believe in a sane defense, but we mustn't let our "defenders" destroy the land they are sworn to protect. The strength of our democracy was founded on the belief that the military must be accountable to the people and subjected to the laws of the land. Your bill S. 1584 is essential to true national security and defense. Again, thank you.

Sincerely,

Elisa Adler

Elisa Adler

cc. Senator Alan Cranston

P.O. BOX 1092

APPRAISAL SERVICES
46 "A" HARBISON STREET
QUINCY, CALIFORNIA 95971

(916) 283-2655

January 14, 1988

Senator Harry Reid
United States Senator
Washington, D. C.

Dear Senator Reid:

As a resident of Quincy, California, Plumas County, I want to express the terror felt by my family and myself caused by sonic booms from military aircraft. It is a form of pollution which in in an era of awareness, I can't beleive continues. When a young child cries from one of these incredibly loud intrusions and a dog runs away and gets hit by a car, I think it has gone too far. You must stop this invasion of privacy. Thank you.

Yours very truly,

Daniel R. Winston
Appraiser

JANUARY 10/88

TO WHOM IT MAY CONCERN:

DURING THE YEARS I'VE BEEN A RESIDENT OF PLUMAS COUNTY I HAVE BEEN VERY UPSET BY THE LOUDNESS AND STRENGTH OF THE SONIC BOOMS. RECENTLY MY MOTHER WAS VISITING ME FROM OAKLAND. SHE INFORMS ME THAT RESIDENTS OF THE SAN FRANCISCO BAY AREA ARE NOT SUBJECT TO EXPOSURE FROM SONIC BOOMS.

DURING MY PREGNANCY IN 1985, THERE WERE QUITE A FEW SONIC BOOMS IN OUR AREA. DURING ONE , MY DAUGHTER THEN A FETUS IN UTERO, REACTED TO THE SONIC BOOM BY MOVING STRONGLY. FROM THIS EXPERIENCE I CAN ONLY CONCLUDE THAT THE UNBORN HEAR AND REACT TO THIS UNPLEASANT EXPERIENCE ALSO.

PREVIOUS TO LIVING HERE I RESIDED IN THE VIRGINIA CITY AREA OF NEVADA WHERE SONIC BOOMS WERE ALSO A BAD PROBLEM. ON ONE OCCASION WINDOWS CRACKED BECAUSE OF THE VIBRATIONS AND EYE GLASSES BOUNCED OFF A TABLE FALLING AND BREAKING ON IMPACT WITH THE FLOOR. THE MILITARY OFFERED NO COMPENSATION AND ADAMANTLY REFUSED TO EVEN CONSIDER RESPONSIBILITY. THE OWNER OF THE GLASSES WAS FINANCIALLY UNABLE TO REPLACE THEM FOR OVER SIX MONTHS FOLLOWING THE INCIDENT.

AT TIMES MY DOOR VIBRATES AND BANGS EVEN THOUGH IT IS CLOSED DURING SONIC BOOMS. THE WINDOWS RATTLE AND VIBRATE AS IF THERE IS AN EXPLOSION OR SOME FORCE BLASTING AIR OUTSIDE. MY DAUGHTER IS NOW ONE AND HALF YEARS OLD AND SHE STOPS WHAT EVER SHE IS DOING AND SEEKS MY ASSURANCE AND COMFORT THAT SHE IS SAFE WHENEVER THERE IS A SONIC BOOM. CONTINUED NEXT PAGE.

SONIC BOOMS CONTINUED....

AN OLDER WOMAN WHO LIVES FURTHER DOWN THE FEATHER RIVER CANYON TELLS ME SHE BELIEVES THE SONIC BOOMS ARE DESTROYING THE BIRD POPULATION. I HAVE READ THAT SONIC BOOMS ARE INTERFERING IN WILDLIFE MATING AND REPRODUCTION CYCLES. MAINLY BECAUSE THESE ANIMALS AND BIRDS ARE VERY SENSITIVE TO ANY UN- NATURAL EFFECTS AT THE TIME THEY ARE MATING. I CAN ONLY WONDER WHAT EFFECTS THE CONSTANT SONIC BOOMS HAVE ON MY DAUGHTERS SMALL BODY AND HER EARS ESPECIALLY.

I KNOW THE EFFECTS I EXPERIENCE WHICH INCLUDE EXTREME MENTAL DISTRESS, PHYSICAL DISCOMFORT AND PANIC AT THESE UNEXPECTED LOUD NOISES AND FRIGHTENING VIBRATIONS.

SINCE MY DAUGHTER'S BIRTH I HAVE TRIED TO LIMIT MY REACTIONS SO AS TO PROTECT HER FROM THE PANIC I FEEL WHEN THESE BOOMS OCCUR. BUT I'M NOT SURE THIS IS ACTUALLY A GOOD REACTION AS I FEEL AND AM CERTAIN THAT SOMETHING IS VERY WRONG WHEN WE ARE PUT TO SO MUCH CARELESS ABUSE WITH NO THOUGHT AS TO WHAT EFFECT THIS PRACTICE HAS ON OUR HEALTH AND WELL BEING.

AS FAR AS I KNOW WE HAVE BEEN CATAGORICALLY IGNORED AND DISCOUNTED BOTH HERE IN NORTHERN CALIFORNIA AND NEVADA.

IN REPRESENTATION OF HOW AWARE I AM OF THESE VIOLATIONS OF MY RIGHT TO LIFE, LIBERTY AND THE PURSUIT OF HAPPINESS I ENCLOSE A LIST OF SOME OF THE SONIC BOOMS THAT INTERFERED WITH MY LIFE DURING THE PAST YEAR.

YOURS IN THE NOISE....... Annette English

PO Box 407
Quincy, CA 95971

SONIC BOOMS 1987

note: this is an incomplete and casual record

2/13/87	10:12 am	KEDDIE, CA
3/17/87	1:55 pm	KEDDIE, CA
3/13/87	9:43 am	QUINCY, CA
3/13/87	9:50 am	CHICO, CA
3/24/87	12:05 pm	KEDDIE, CA
3/24/87	1:32 pm	KEDDIE, CA
5/11/87	4:21 pm	KEDDIE, CA
6/10/87	8:58 am	KEDDIE, CA
6/22/87	10:02 am	KEDDIE, CA
7/23/87	9:00 am	KEDDIE, CA
1988		
1/9/88	Late morning,	QUINCY, CA
1/11/88	10:16 am	KEDDIE, CA

January 14, 1987 Senate Hearing on military airspace

Senator Reid,

My name is Bill Rosse, Sr. I am Chairman of the Environmental Protection Committee and member of the Western Shoshone National Council (WSNC). I am here on behalf of the WSNC. The Western Shoshone Nation opposes the withdrawal of airspace over the Shoshone Nation. As you well know, the Western Shoshone Nation is still in negotiations with the U.S. Government over these lands.

We feel while we are in negotiations there should not be any withdrawals over our land.

The U.S. Government can not show proof on how they obtained the land. The Supreme Court could not say the land is not ours. The high court referred it back to Judge Thompson's Court in Reno, which has ruled that the Shoshone still have posessory rights to the land. This was in the Summer of 1986 and Judge Thompson's decision was dated September 15, 1986.

There also was a hearing in San Francisco on December 15-1988 regarding the Dann Case and there was no decision by the three-Judge panel. We do not know when they will make a decision.

The U.S. Government has already criss-crossed the United States with restricted arispace, and we feel it does not need anymore, especially over our lands. The Native American is the one who suffers most because of the failure of the U.S. Government to recognize that we are people too. They feel that Indians don't count.

Low-flying jets and sonic booms have occurred over many Indian Reservations in Nevada, Arizona, Utah, Texas, New Mexico, the Dakotas and Montana, as well as over Indian lands in Canada.

Again, I say we are opposed to these airspace withdrawals. Thank you.

William Rosse, Sr. Chairman, Environmental Committee of the Western Shoshone National Council

William Rosse Sr.
Rt. 1 Box 18
Austin Nev. 89310

Quincy,California
January 13, 1988

Dear Senator Reid:

Quincy is a small rural town located in northeastern California. Reno,Nevada is 87 miles to the east and Sacramento is 180 miles to the west. This area enjoys the blessing of being peaceful and quiet. For those reasons just mentioned many people have chose to live here and raise their children.

Now the opportunity to treasure and enjoy the blessings of a peaceful quiet area treasured so dearly seems very seriously endangered by military aircraft of the United States military. These military aircraft on many occassions have disrupted life in the Quincy area by creating sonic booms.

These aircraft have total disregard for people and their right to privacy. Time and time again I have called the Office of Public Affairs at Beale Air Force Base to report sonic booms.

These sonic booms come at completely unexpected times. Words cannot come close to describing the fears invoked. There is a great deal of tension and anxiety caused.

Military aircraft have a mission to complete. It seems to me that there are many areas that are sparsely populated or where no population exists. Aircraft with training missions shoud conduct their training in these areas.

As an American taxpayer I don't mind paying taxes to be defended. I do however object to being tormented and having my life intruded on by a sonic boom. Day to day life for myself and others has enough problems without having an additional one. Someone needs to have the miliary get their act together and remember other people have some rights.

Your efforts to resolve the situation as related above will be appreciated by me and many others in this area.

Sincerely yours,

James I. Overstreet

January 21, 1988

Senator Harry Reid
300 Booth St.
Reno, Nevada 89509

Dear Senator Reid:

I recently read an article in the Reno Gazette Journal for Friday, January 15, 1988, concerning adverse influences of military training missions and bussing episodes. I would like to add my story to your list.

My husband and I moved to Ione, Nevada in November, 1980 and left in 1986 and at that time, Ione and the surrounding areas were buzzed every time a bunch of new recruits went to Fallon Naval Air Base to learn whatevever they do. They got so low over buildings, pictures would jump off walls and cracks would appear in plaster. I can remember seeing pilots' faces and being able to read the serial numbers and see the flames in the rear of their aircraft as they passed overhead just before the roar hit you. It was not uncommon for them to buzz stalled vehicles on the roads.

We were told by the Ione natives, that complaints were useless and so despite the annoyance, did nothing, but endure.

In December, 1983, our daughter, Elizabeth, was born. Even though she was raised from birth in this "war zone", it frightened her tremendously and she would scream and tremble before she could talk and walk. When she learned to walk at nine months, everytime a jet came over, she would scream and run to take cover under something and if nothing was available, she would curl up into a natal ball and throw her arms over her head. It always took long minutes to calm her. After a while she reacted like this to every aircraft, but more so with the military jets.

When the jets flew at night, she would curl into her tight ball and cry and tremble violently in her sleep.

She could hear the jets coming long before my husband and I, and always came running for cover and comfort when she heard them. We spent much time teaching her what was and was not a friendly plane. We tried all kinds of methods to conquer her fear of these aircraft to no avail.

When we left Ione in 1986, we moved to Elko and lived in Spring Creek. Luckily there weren't many military flights there and when they flew, they were high. Still she was expecting them all the time and she'd start crying when a truck rumbled by on the highway.

My daughter is now four and knows the difference between small friendly planes, airline jets and military jets. She is no longer afraid of aircraft and does not expect to hear the military jets, but loud, sudden noises still make her tremble and look for comfort. She has a very sensitive nature and cries very easily. How much of this is due to her early experiences? I don't know. Will this effect her in later life? I sincerely hope not.

I am bitter towards those military people who so callously buzzed Ione and the surrounding areas with none or at least little thought for the people who lived there. I object to being considered an imaginary target for bombs or a sight seeing trip for new recruits.

The military has always refused to recognize that these new recruits deviate from their fight plans or maybe we were on their flight plans but at a much higher altitude. I don't know, but when a pilot was caught being somewhere he wasn't supposed to be--all he got was a light slap on the wrist and made to promise to do better next time, and meanwhile in approximately six weeks, here comes a brand new batch of fly boys and it all starts over again.

I know I haven't any documentation for this story beside maybe being able to round up some eye witnesses to confirm my daughter's behavior when a jet went over. I have also considered it useless to complain to the military, as they refuse to acknowledge anything adverse to themselves. But when I read the article in the paper that day, I realized this might be my last chance to say anything. And thus my story. . . .

Sincerely,

Jennifer Rhodes

Jennifer Rhodes
10615 Plata Mesa
Reno, Nevada 89506

March 6, 1987

Honorable Senator Cranston
United States Senate
Washington, D.C. 20510

Dear Senator Cranston:

The increasing military occupation of airspace over rural Plumas County is becoming intolerable to local residents. Several hundred county residents signed a petition to Beale Air Force Base and Mc Clellan Air Force Base protesting sonic booms last year. The Plumas County Grand Jury has twice joined their fellow citizens in protest against sonic booms.

Nonetheless the military presence over Plumas County is ever more audible and visible. Our skies are alive with weapons carriers and military transport carriers. Loyal citizens are under the gun, feeling more like inhabitants of a militarily occupied country than the populace of a democratic country enjoying peacetime.

We know that we are not the only rural Americans subjected to the almost constant noise of increased military training. We are in contact with citizens groups in Nebraska, Kansas, North Dakota, Nevada and California. Ranchers, Native American tribes, citizens' groups representing "high health risk" residents (senior citizens, pregnant mothers, and small children), rural home owner associations, recreational interest groups, and local governmental agencies; are organizing and coordinating to try and make their voices heard by military personnel. Even with increased coordination, we rural Americans in military airspace areas, are finding it exceedingly difficult and expensive to obtain specific information about the "why", "where", "when", and "for how long"; of military operations overhead. Instead we receive patronizing responses to our inquiries that, at best, provide little information, and at worst, question our patriotism for presuming to inquire at all.

You have consistently maintained your concern for the people and land in our area and on the planet, while you have advocated a strong military defense. So when Carol Goldman invited us to submit a request for a congressional inquiry, we felt sure that you would be concerned about our problems, and supportive of our efforts to better understand our predicament and our options. We are not opposed to a strong defense. We are opposed to the apparent lack of accountability and the lack of basic respect for public involvement and public concerns that characterizes the military presence here. We are questioning, along with many other Americans, the real effectiveness of congressional oversight over military spending and military operations. We know that it is civilian control over the military, balanced with a strong and prepared military, that preserves our freedom. We look to you and your colleagues in Congress to scrutinize the implementation of the 2 trillion dollar military budget that you have authorized. We look to you to independently evaluate the cost-effectiveness of military training activities that dominate our skies day and night, and impair our way of life.

In general, we could subscribe to a "fair share" mechanism for distributing monetary and non-monetary damages associated with "essential" peacetime military field preparedness. However, we are unable to determine what this massive increase in local military testing and training means in the big picture of "essential" peacetime military preparedness. What criterion and procedures guide the distribution of social costs like property damages, health risks, and the constant violation of our peace and privacy? We request your help in obtaining forthright and timely information about these concerns.

Specifically, after spending considerable amounts of time and money, we have had no success in obtaining information (or even information sources) for the following questions:

Where and how do we obtain maps and logs of air traffic (civilian and military) over Plumas County?

Where and how do we obtain a current map of military airspace corridors and military operations areas (MOA's and SOA's)?

Where can we obtain information about military airspace designations (like "MOA's" and "SOA's") which describes both permitted and unlawful activities in terms like frequency, intensity, duration, and nature of specific activities.

What social and environmental impacts are anticipated from specific activities under these different designations?

What is the military airspace designation process and how is public input integrated into the decisionmaking process?

How can we obtain current and future information about military airspace operations which indicates clear lines of authority and accountability for specific activities, in specific areas of military airspace over Plumas County?

What procedures exist for notification of persons potentially affected by MOA and SOA designations?

What procedures exist for notification of "high risk" people potentially affected by changes in the duration, frequency, intensity, or nature of activities in a military airspace area?

Thank you again for your concern, and for your attention to this matter.

Sincerely

Brian Watts
Star Route
Taylorsville, Ca
95983

Spokesperson for citizens concerned about military usurpation of airspace over Plumas County.

CC Sen Harry Reid

P.O. Box 803
Meadow Valley, CA 95956
January 13, 1988

Senator Harry Reid

Dear Senator Reid:

I would like to express my support for the Airspace Protection Act.

As a resident of rural northern California and a frequent user of Sierra Nevada wilderness areas, I am very much disturbed by the almost constant, intrusive presence of low-flying military aircraft and by frequent, nerve-shattering sonic booms.

I feel that our military must be accountable for their use of our country's skies, and that this use should be subject to preiodic review with some civilian participation.

Thank you for your efforts.

Sincerely,

Janet Wolcott

Janet Wolcott